152 225

152 5444

RECORD, CASE No. 14,258.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 243.

BARTHOLD SCHLESINGER AND SEBASTIAN B. SCHLESINGER, PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF NAYLOR & COMPANY, APPELLANTS,

vs.

THE KANSAS CITY AND SOUTHERN RAILWAY COMPANY, THE KANSAS CITY AND SOUTHERN CONSTRUCTION COMPANY, THE FARMERS' LOAN AND TRUST COMPANY, AND JAMES I. BROOKS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED OCTOBER 13, 1890.

RECORD, CASE No. 14,258.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 243.

BARTHOLD SCHLESINGER AND SEBASTIAN B. SCHLESINGER, PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF NAYLOR & COMPANY, APPELLANTS,

vs.

THE KANSAS CITY AND SOUTHERN RAILWAY COMPANY, THE KANSAS CITY AND SOUTHERN CONSTRUCTION COMPANY, THE FARMERS' LOAN AND TRUST COMPANY, AND JAMES I. BROOKS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Order filing bill and directing that subpœna issue	1	1
Bill of complaint	1	1
Exhibit—Deed between the Kansas City and Southern Construction Co. and the Kansas City and Southern Railroad Company, May 24, 1880	7	4
Subpœna	11	7
Marshal's return	12	7
Order entering appearance for defendant	12	7

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 7, 1893.

	Original.	Print.
Appearance for defendant	12	7
Demurrer to bill	13	8
Order filing motion for leave to amend bill	16	10
Order fixing motion for hearing and directing notice of same	16	10
Motion for leave to file amended and supplemental bill	17	11
Order filing amended bill of complaint	17	11
Amended bill of complaint	18	11
Exhibit—Deed between the Kansas City and Southern Construction Co. and the Kansas City and Southern Railroad Company, May 24, 1880	32	20
Exhibit—Deed between the Kansas City and Southern Construction Co. and the Kansas City and Southern Railroad Co., September 18, 1880	35	21
Exhibit—Deed from the Kansas City and Southern Construction Co. to James I. Brooks, May 11, 1881	37	23
Order granting leave to answer	39	24
Order filing answer and continuing hearing of application for receiver	39	24
Answer of the Kansas City and Southern R'y Co	39	25
Order filing replication	52	32
Replication	52	32
Order fixing time to take testimony	53	33
Order withdrawing appearance of Botsford and Williams	53	33
Order granting leave to file amended answer	53	33
Supplemental bill	54	33
Application for order directing service on John O'Grady, attorney	55	34
Order granting application for service on John O'Grady, attorney	57	35
Application for an order on Farmers' Loan and Trust Company to appear	57	35
Order granting order on Farmers' Loan and Trust Company to appear	59	36
Proof of service of foregoing application and order	60	37
Subpœna to John O'Grady, attorney	63	39
Marshal's return	64	39
Order filing answer of Brooks	64	40
Answer of James I. Brooks	64	40
Order filing answers of Farmers' Loan and Trust Co	68	42
Answer of Farmers' Loan and Trust Co	68	42
Answer of Farmers' Loan and Trust Co	78	48
Replication	80	49
Order continuing cause	81	49
Order granting leave to take testimony	81	50
Order filing stipulation to continue, &c	81	50
Stipulation as to time and place of hearing, &c	82	50
Order filing stipulation to continue, &c	82	50
Stipulation to continue, &c	83	51
Stipulation as to evidence	83	51
Stipulation as to date of trial	84	51
Stipulation as to facts	85	52
Submission	85	52
Opinion of Judge Brewer	87	53
Order filing decree	96	58
Final decree	96	58
Allowance of appeal	97	58

	Original.	Print.
Abstract of pleadings	98	59
Abstract of complainants' proofs	109	66
Documentary evidence	109	66
Deposition of William D. Burke	119	72
Frank S. Ware	120	73
William Miller	121	73
James I. Brooks	131	79
J. B. Colt	135	81
Thomas K. Hanna	137	83
Benj. McLean	141	85
Additional documentary evidence	148	89
Defendants' abstract	150	90
Complainants' documentary evidence	168	101
Articles of association of K. C., M. & M. R. R. Co	170	102
Order of the district court of the United States for the western district of Missouri adjudicating K. C., M. & M. R. R. Co. a bankrupt	175	105
Record of the district court of the United States for the western district of Missouri showing election of assignees	176	106
Order of the district court of the United States for the western district of Missouri approving election of assignees	177	106
Deed of assignment of bankrupt estate	177	106
Petition of assignees for sale of roadway, &c	179	107
Order of court directing sale	180	108
Report of sale by assignees	181	109
Order of court approving sale	182	110
Clerk's certificate	183	110
Deed from assignees to John D. Bancroft, April 25, 1877	184	111
Deed from John D. Bancroft to T. K. Hanna *et al.*, trustees, April 27, 1877	189	114
Deed from T. K. Hanna *et al.*, trustees, to James I. Brooks, January 13, 1880	194	117
Deed from James I. Brooks to K. C. & S. Construction Co., February 27, 1880	199	121
Deed from James I. Brooks to K. C. & S. Construction Co., April 1, 1880	202	122
Resolutions of board of directors of K. C. & S. R'y Co	205	124
Certificate of organization of K. C. & S. Construction Co	209	127
Extract from general statutes of Connecticut	212	128
Record in case of Schlesinger *et al. vs.* K. C. & S. Construction Co.	213	129
Petition	213	129
Answer	214	129
Order filing interplea	215	130
Interplea	215	130
Order filing answer to interplea	218	132
Answer to interplea	219	132
Judgment	219	132
Order filing motion for new trial, &c	220	133
Order filing stipulation as to hearing of motion	220	133
Order taking motion under advisement	221	134
Judgment on remittitur	221	134
Orders denying motions for rehearing and in arrest of judgment	222	135

	Original.	Print.
Complainants' additional documentary evidence	223	135
Certificate of Clinton and Memphis branch of the Tebo and Neosho R. R. Co.	224	135
Certificate of K. C., M. & M. R. R. Co.	227	137
Resolutions of board of directors of K. C., M. & M. R. R. Co.	228	138
Certificate of Clinton and Memphis branch of the Tebo and Neosho R. R. Co.	231	140
Abstract of attachment in Jackson county, Missouri	233	141
Abstract of attachment in Cass county, Missouri	234	141
Abstract of attachment in St. Clair county, Missouri	237	143
Abstract of attachment in Henry county, Missouri	239	144
Complainants' additional documentary evidence	241	145
Deed from K. C. & S. R'y Co. to Farmers' Loan and Trust Co., January 1, 1883	242	145
Report of K. C. & S. R'y Co. to R. R. commissioners for year ending December 31, 1883	257	154
Report of K. C. & S. R'y Co. to R. R. commissioners for year ending December 31, 1886	286	154
Notice to take depositions	307	178
Marshal's return	308	178
Commissioner's certificates	308	178
Notice to take depositions	311	180
Sheriff's return	312	180
Deposition of Sebastian B. Schlesinger	314	181
Exhibit A—Contract with Naylor & Co.	344	198
B—Letter of Brooks to Naylor & Co., May 18, 1880	346	199
C—Agreement, Naylor & Co. and Sonora R'y Co., May 18, 1880	347	199
D—Approximate statement	349	200
Commissioner's certificate	350	201
Notice to take depositions	352	202
Deposition of James I. Brooks	354	204
Commissioner's certificate	365	210
Notice to take depositions	366	211
Deposition of William C. Burke	367	212
Frank S. Ware	370	213
Notary's certificate	371	214
Notice to take depositions	372	215
Deposition of William Miller	375	216
Notary's certificate	398	229
Notice to take depositions	399	230
Deposition of Amos Tenney	400	231
Notary's certificate	418	241
Exhibit No. — (Tenney)—Agreement of owners of K. C., M. & M. R. R., November 1, 1879	419	241
No. 2 (Tenney)—Agreement of trustees, December 15, 1880.	421	242
No. 3 (Tenney)—Agreement of trustees, December 15, 1880.	424	244
No. 4 (Tenney)—Deed from trustees to Brooks, January 13, 1880	430	248
Notice to take depositions	436	251
Deposition of J. B. Colt	437	252
Notary's certificate	440	254
Notice to take depositions	441	254

	Original.	Print.
Deposition of Thomas K. Hanna	442	255
Benjamin McLean	452	261
Notary's certificate	475	274
Exhibit A—Deed from trustees to Brooks, January 13, 1880	476	274
B—Agreement of trustees, December 15, 1880	479	275
Deposition of John D. Bancroft	486	279
Notary's certificate	502	289
Appeal bond	503	289
Clerk's certificate	505	290

1 UNITED STATES OF AMERICA, *set:*

Be it remembered that heretofore, to wit, in vacation of the circuit court of the United States for the western division of the western district of Missouri, and on the 10th day of November, A. D. 1881, the following entry was made upon the order book of said court:

BARTHOLD SCHLESINGER *et al.*
against } 401.
THE KANSAS CITY AND SOUTHERN RAILROAD CO.

This day come complainants, by their solicitors, Lathrop and Smith and John K. Cravens, and file bill herein; whereupon it is ordered that subpœna issue according to the course in chancery, returnable to the December rules.

Said bill of complaint is in words and figures as follows:

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

Barthold Schlesinger and Sebastian B. Schlesinger, complainants, state that at the date hereinafter stated they were and now are citizens of the State of Massachusetts; that at the dates hereinafter named they were and now are copartners in trade under the firm name and style of Naylor & Company; and said complainants bring this their bill of complaint against the Kansas City and Southern Railroad Company, which at the dates hereinafter named was and now is a corporation organized under the laws of the State of Missouri, is a citizen of the State of Missouri, domiciled in the western division of the western district of said State.

Your orators complain of the defendant, The Kansas City and Southern Railroad Company, and state that heretofore, to
2 wit, on the 24th day of May, 1880, the Kansas City and Southern Construction Company, a corporation organized under the laws of the State of Connecticut, was the owner, seized and possessed of certain property situated in the counties of Jackson, Cass, Henry, and St. Clair and other counties, in the State of Missouri, and known as the Kansas City, Memphis & Mobile railroad, running from Kansas City, in Jackson county aforesaid, in the direction of Memphis, in the State of Tennessee, together with all and singular the rights of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever and wheresoever situated, belonging or in anywise appertaining to said railroad, as also the franchise and right to construct, maintain, and operate upon and along said railroad and right of way a railroad; and your orators further state that at and before the 24th day of May, 1880, the said Kansas City and Southern Construction Company became and was and now remains indebted to your orators in a large sum of money, to wit, in the sum of thirty-nine thousand eight hundred and seven dollars and eighty-eight cents ($39,807.88) on account of — certain contract in writing made and entered into by and be-

tween your orators and said Kansas City and Southern Construction Company on the 2nd day of March, 1880, by which your orators agreed to sell and supply to and said Kansas City and Southern Construction Company to purchase and receive a large quantity of iron rails to be used in equipping said railroad; and your orators further state that on the 7th day of October, 1881, they commenced their proper action in the circuit court of the county of Jackson aforesaid to recover of and against said Kansas City & Southern Construction Company judgment for said sum of $39,807.88, together with interest at the rate of sic per cent. per annum from the —
3 day of ——, 1880, and that at the time of the commencement of their said action they caused writs of attachment to issue therein out of said court to the counties of Jackson, Cass, Henry, and St. Clair against the property of said Kansas City and Southern Construction Company; and your orators further state that on the attachment so issued to the county of Jackson the sheriff of said county on the 7th day of October, 1881, levied upon and seized, and attached all the right, title, and interest of said Kansas City & Southern Construction Company of, in, and to the following-described property, to wit: The Kansas City, Memphis and Mobile railroad, running from Kansas City, Jackson county, and State of Missouri, in the direction of Memphis, in the State of Tennessee, together with all and singular the right of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever and wheresoever situated of and belonging to or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company, being the same property conveyed by the Kansas City and Southern Construction Company to the Kansas City and Southern Railroad Company by deed dated the 24th day of May, 1880; and your orators further state that on the writ of attachment so issued to the county of Cass the sheriff of said county on the 12th day of October, 1881, levied upon and seized and attached as the property of said Kansas City and Southern Construction Company, to wit, all the right, title, & interest and property of said company in the Kansas City, Memphis & Mobile railroad, running from Kansas City, State of Missouri, in the direction of Memphis, in the State of Tennessee, with all and singular the right of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever and wheresoever situated of and belonging to or in anywise appertaining to said railroad, to-
4 gether with all the franchises of the Kansas City, Memphis and Mobile Railroad Company; and your orators further state that in the writ of attachment so issued to the county of Henry the sheriff of said county on the 12th day of October, 1881, levied upon and seized and attached as the property of said Kansas City and Southern Construction Company the following property, to wit: All the right, title, and interest of said Kansas City and Southern Construction Company in the Kansas City, Memphis and Mobile railroad, running from Kansas City, Missouri, in the direction of Memphis, in the State of Tennessee, together with all and singular the right of way, road-bed, masonry, property, rights of property, and

appurtenances whatsoever or wheresoever situated of and belonging or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company; and your orators further state that on the 11th day of October, 1881, on the writ of attachment issued to the county of St. Clair the sheriff of said county seized and attached as the property of said Kansas City and Southern Construction Company all the right, title, and interest of said Kansas City and Southern Construction Company of, in, and to the Kansas City, Memphis & Mobile railroad, running from Kansas City, State of Missouri, in the direction of Memphis, in the State of Tennessee, together with all and singular the right of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever and wheresoever situated of and belonging or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company; and your orators further state that on the days on which the said several sheriffs made the levies, seizures, and attachments as hereinbefore set
5 forth they respectively filed in the office of the recorder of deeds in their respective counties abstracts of the attachments, levies, and seizures so made by them showing the names of the parties to the suit, the amount of debt sued for, the date of the levy, and a description of the property levied upon; and your orators further state that heretofore, to wit, on the 24th day of ——, 1880, said Kansas City & Southern Construction Company, while so indebted to your orators as aforesaid, by its deed of that date conveyed to the defendant herein the property hereinbefore described; that said deed was duly filed for record and was recorded in the county of Jackson aforesaid, on the 12th day of June, 1880, in Book B No. 45, at page 606 and following; that said deed upon its face recites and purports to have been made for the consideration of the transfer to said Kansas City & Southern Construction Company by the defendant, The Kansas City & Southern Railroad Company, of $300,000 of the capital stock of said defendant, and of the issue by said defendant to said Kansas City and Southern Construction Company of certificates of capital stock to that amount, and for the further consideration of the transfer and payment to said Kansas City & Southern Construction Company by the defendant of $300,000 of the first-mortgage bonds to be issued by the defendant and secured by mortgage on the property conveyed by said deed to defendant; and your orators further state that the defendant has not at any time issued to said Kansas City and Southern Construction Company certificates of its capital stock to the amount of $300,000 nor to any amount whatever; that defendant has not at any time transferred to or in manner conferred upon said Kansas City & Southern Construction Company any of its cap-
6 ital stock or any right as stockholder of defendant; that defendant has not at any time tendered or offered to said Kansas City & Southern Construction Company any certificates or any shares of its capital stock; that defendant has not at any time issued or transferred to said Kansas City and Southern Construction

Company the first-mortgage bonds of defendant to amount of $300,000 nor to any other amount whatever; that defendant has not at any time tendered or offered to said Kansas City and Southern Construction Company its first-mortgage bonds for the amount of $300,000 or for any amount whatever; and your orators charge the fact to be that the consideration recited in said deed and upon which it purports to have been made is wholly colorable, and that said deed was made wholly without any consideration whatever, and said deed was the wholly voluntary conveyance of said Kansas City & Southern Construction Company, and said defendant now holds the title to the property therein conveyed without having paid any consideration therefor; that the property so conveyed is the same property that was owned by the Kansas City and Southern Construction Company at date at which it contracted the debt to your orator for which it has brought suit by attachment in the circuit court of Jackson county, Missouri, as hereinbefore set forth, and is the same property upon which the attachments in said suit have been levied from Kansas City, in Jackson county, to the southern and eastern boundaries of St. Clair county.

A certified copy from the office of recorder of deeds of Jackson county, Missouri, of said deed from the Kansas City and Southern Construction Company to defendant is hereto attached and made part hereof.

Wherefore your orators most humply pray that said deed
7 of conveyance so made by said Kansas City & Southern Construction Company to the defendant on the 24th day of May, 1880, and recorded in the record of deeds in Jackson county, Missouri, in Book B No. 45, at page 606 and following, may by the decree and judgment of this honorable court be held and adjudged fraudulent and void as against the debts, claims, and demands of your orators as hereinbefore set forth, and that by the judgment and decree of this honorable court said deed and the record thereof may be cancelled, set aside, and for naught held as against debts, claims, and demands of your orators against said Kansas City & Southern Construction Company, and for such other and further relief as to your honors may seem meet and equitable in the premises.

May it please your honors to grant unto your orators the writ of subpœna directed to the defendant, The Kansas City & Southern Railroad Company, commanding it at a time certain therein to be named personally to appear before this honorable court, then and there full, true, direct, and perfect answer to make to all and singular the premises; and your orators expressly waive all requirements that such answer shall be made under oath.

LATHROP & SMITH AND
JOHN K. CRAVENS,
Solicitors for Complainants.

This indenture made and entered into this twenty-fourth day of May A. D. 1880 by and between the Kansas City and Southern Construction Company a corporation of the State of Connecticut

party of the first part, and the Kansas City and Southern Railroad Company a corporation of the State of Missouri party of the second part, witnesseth: That for and in consideration of the transfer to
said party of the first part, by said party of the second part,
8 of three hundred thousand dollars of the capital stock of said party of the second part and of the issue of certificates therefor to said party of the first part by said party of the second part and for the further consideration of the transfer and payment to said party of the first part by said party of the second part of three hundred thousand dollars of the first-mortgage bonds to be issued by said party of the second part and secured by mortgage on the property hereby conveyed with all other property of said party of the second part acquired or to be acquired said party of the first part hereby transfers, conveys bargains and sells, and assigns to said party of the second part the following-described property, namely:

The Kansas City, Memphis and Mobile railroad running from Kansas City Jackson county and State of Missouri in the direction of Memphis in the State of Tennessee and Mobile in the State of Alabama, through the States of Missouri and Arkansas together with all and singular the rights of way, road-bed, masonry property, rights of property and appurtenances whatsoever and wheresoever situated of and belonging or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company. To have and to hold the said property hereby conveyed unto the said party of the second part and to its assigns forever.

In witness we James I Brooks as president and George B. Ripley as secretary of the Kansas City and Southern Construction Company by direction of the board of directors thereof have hereunto subscribed our names and caused the common seal of said Kansas City and Southern Construction Company, to be hereunto affixed this twenty-fourth day of May 1880.

[SEAL.] JAMES I. BROOKS,
President of the Kansas City and Southern Construction Company.
9 GEO. B. RIPLEY,
Secretary of the Kansas City and Southern Construction Company,
By GEORGE B. RIPLEY.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Charles Edgar Mills, a commissioner duly appointed by the governor of the State of Missouri to take the acknowledgment and proof of deeds and other instruments to be recorded in said State of Missouri, do hereby certify that George B. Ripley, secretary, who is personally known to me to be such officer and to be the identical person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that as the

secretary of the Kansas City and Southern Construction Company he signed, sealed, and delivered the foregoing instrument, with the corporate seal of the said Kansas City and Southern Construction Company thereto affixed, as the free and voluntary act and deed of the said company for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this 24th day of May, A. D. 1880.

[SEAL.] CHARLES EDGAR MILLS,
Commissioner for Missouri in New York,
117 *Broadway, N. Y. City.*

STATE OF MISSOURI, }
County of Jackson, } *ss:*

Be it remembered that this day personally appeared before me, the undersigned, within and for the county and State above written, James I. Brooks, who is personally known to the under-
10 signed to be the same person whose name as president of the Kansas City and Southern Construction Company is subscribed to the foregoing deed, and acknowledged that he executed, attached the common seal of said construction company to, and delivered the same as the voluntary act and deed of said Kansas City and Southern Construction Company for the uses and purposes therein contained. I certify that my commission expires Jan'y 13, 1883.

In witness whereof I have hereunto set my hand and affixed my notarial seal. Done at office, in Kansas City, Mo., this 31st day of May, 1880.

[L. S.] ED. L. SCARRITT,
Notary Public.

Filed for record and duly recorded in my office this 12th day of June, A. D. 1880, at 3.40 p. m.

CHAS. D. LUCAS, *Recorder,*
By E. F. HEDGES, *D. R.*

STATE OF MISSOURI, }
County of Jackson, } *ss:*

I, Chas. D. Lucas, recorder of deeds within and for the county and State aforesaid, do hereby certify that the above and foregoing is a true and perfect copy of the record of deed — Kansas City and Southern Construction R. Road Co., with acknowledgment and note of record thereon endorsed, as the same remains of record in my office in Book B No. 45, at page 606 and following.

In testimony whereof I have hereunto set my hand and affixed the seal of my said office, at office, in Kansas City, Mo., on this 5th day of November, A. D. 1881.

[SEAL.] CHAS. D. LUCAS, *Recorder,*
By E. F. HEDGES, *Deputy.*

And thereupon a subpœna in chancery was issued against
11 said defendant and delivered to the marshal, and the same was afterwards, to wit, on the 21st day of January, 1882, re-

turned in the clerk's office duly served. Said subpœna in chancery and return thereon are in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

The President of the United States of America to the Kansas City and Southern Railroad Company, Greeting:

You are hereby commanded to be and appear at rules to be held at the office of the clerk of the circuit court of the United States for the western division of the western district of Missouri on the first Monday of December next, at the city of Kansas, then and there to answer the bill of complaint of Barthold Schlesinger and Sebastian B. Schlesinger, citizens of the State of Massachusetts, filed against you on the 10th day of November, A. D. 1881; hence fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 16th day of Novem-
[SEAL.] ber, 1881.

Issued at office, in the city of Kansas, under the seal of said court, the day and year last aforesaid.

H. C. GEISBERG,
Clerk of said Circuit Court,
By WARREN WATSON, *D. C.*

MEM.—The defendant to enter its appearance in this suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

12 H. C. GEISBERG, *Clerk,*
By WARREN WATSON, *D. C.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

I do hereby certify that I executed this writ by delivering a true copy thereof, also a certified copy of the bill of complaint filed in the case, to George H. Briggs, chief engineer of the Kansas City and Southern Railroad Company, the president of the company not found in this district and said Briggs being in charge of the office.

C. C. ALLEN,
U. S. Marshal, Western District of Missouri,
By R. M. ELLIOTT, *Deputy.*

And afterwards, to wit, on the 2nd day of January, A. D. 1882, the following entry was made of record:

BARTHOLD SCHLESINGER *et al.*
against } 401.
THE KANSAS CITY & SOUTHERN RAILROAD COMPANY.

This day comes defendant, by its solicitors, Botsford & Williams, and enters appearance herein.

Said appearance is in words and figures as follows:

In the United States Circuit Court, Western Division, Western District of Missouri. In Equity.

BARTHOLD SCHLESINGER and SEBASTIAN B. SCHLESINGER, Complainants,
against
THE KANSAS CITY AND SOUTHERN RAILROAD COMPANY, Defendant.

The above-named defendant, The Kansas City and South-
13 ern Railroad Company, now comes, by its solicitors, and enters its appearance to the above cause.

THE KANSAS CITY & SOUTHERN RAILROAD CO.,
By BOTSFORD & WILLIAMS,
Its Attorneys & Solicitors.

Afterwards, to wit, on the 6th day of February, A. D. 1882, the defendant filed its demurrer to the bill of complaint in words and figures as follows:

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

BARTHOLD S. SCHLESINGER and SEBASTIAN B. SCHLESINGER, Complainants,
against
THE KANSAS CITY AND SOUTHERN RAILROAD COMPANY, the Defendant.

The demurrer of the Kansas City and Southern Railway Company to the bill of complaint of the said Ba-thold S. and Sebastian B. Schlesinger, complainants.

This defendant, by protestation, not confessing all or any of the matters and things in the complainants' bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for causes *fo* demurrer showeth—

I.

That complainants have not alleged nor does it appear by their said bill that the Kansas City and Southern Construction Company, whose deed to this defendant it is by said bill sought to be set aside and cancelled, was at the time of the execution of said deed or at the time of the filing of said bill of complaint or at any time or now is insolvent or that it had not at said times nor now has
14 any property within this State sufficient to satisfy any claim or demand of complainants as set forth in their said bill.

II.

That it appears by said bill of complaint that the property sought to be affected by said bill, to wit, the Kansas City, Memphis and

Mobile railroad, its right of way, franchises, and property, is now in the custody of the circuit court of Jackson county, Missouri, and was in such custody at the time of the filing of said bill, by virtue of the levy of the writs of attachment issued in the suit of said complainants against said Kansas City and Southern Construction Company, then and now pending in said court, and that this court has no jurisdiction of the subject-matter of said bill of complaint.

III.

That complainants have not in and by their said bill made or stated such a case as entitles them in a court of equity to any relief as against this defendant as to the matters contained in the said bill or any of such matters.

IV.

That it appears by said bill of complaint that complainants have a full, complete, and adequate remedy at law against this defendant for all the matters and things alleged in said bill against this defendant.

Wherefore and for divers other good causes of demurrer appearing in the said bill the defendant doth demur thereto and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

THE KANSAS CITY & SOUTHERN RAILWAY COMPANY, *Def't*,
By BOTSFORD & WILLIAMS,
Its Solicitors.

15 I hereby certify that this demurrer, in my opinion, is well founded in point of law.

JAMES S. BOTSFORD,
Of Counsel for Def't.

STATE OF NEW YORK, }
City of New York. }

I, Amos Tenney, being duly sworn, on my oath state that I am secretary of the said Kansas City and Southern Railway Company, and as such have charge of its business and corporate seal, and that the foregoing demurrer in said cause is not interposed for delay, but upon certificate of counsel that the same is well founded in point of law.

AMOS TENNEY.

Sworn to and subscribed before me this 17th day of January, 1882.

In testimony whereof I have hereunto set my hand and affixed my seal. Done at office, in the city of New York, this day and year last aforesaid.

[SEAL.]

J. M. DEUEL,
U. S. Com'r, S. D. of N. Y.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, Joseph M. Duel, clerk of the circuit court of the United States of America for the southern district of New York, second circuit, do hereby certify that I am well acquainted with the handwriting of J. M. Deuel, whose name is subscribed to the annexed jurat, and that the signature to the same is in his proper handwriting; and I do further certify that he was at the time of signing the same a United States commissioner duly appointed by the circuit court of the United States of America for the southern district of New York, second circuit.

16 In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court this 17 day of Jan'y, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of these United States the hundred and sixth.

[SEAL.] J. M. DEUL, *Clerk.*

And afterwards, to wit, on the 1st day of December, 1884, the following entry was made of record in said cause to wit:

BERTHOLD SCHLESINGER *et al.*
against } 401.
KANSAS CITY & SOUTHERN R. R. Co.

This day come complainants, by their solicitors, and file motion for leave to file an amended and supplemental bill and for the appointment of a receiver herein; thereupon the following order was filed and ordered to be recorded, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Complainants,
vs. } In Equity.
KANSAS CITY AND SOUTHERN RAILROAD COMPANY, Defendant.

On December 1, 1884, being rule day of the court, come complainants and file a motion for leave to file an amended and supplemental bill herein and to join the Kansas City and Southern Construction Company as a defendant with said railroad company and to make a variety of new allegations, and among others allegations on which to have a receiver appointed to take possession and charge of the attached property mentioned in the original bill, and also move the court to appoint such receiver, and it is now ordered that such motion be heard on December 15th,

17 1884, and that complainants give said railroad company and said construction company reasonable notice of the time and place of hearing.

(Signed) A. KREKEL, *Judge.*

Said motion is as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Complainants,
against
THE KANSAS CITY AND SOUTHERN RAILROAD COMPANY, Defendant. } 401.

Now come the complainants and move the court for leave to file an amended and supplemental bill herein making the Kansas City and Southern Construction Company a defendant with said railroad company and making a variety of new allegations, and among others allegations on which to ask for the appointment of a receiver to take charge of the attached property mentioned in the original bill, and complainants also move the court to appoint a receiver to take possession and charge of such attached property and to perform such other duties as may be devolved upon him.

GARDINER LATHROP,
JEFFERSON BRUMBACK,
Solicitors for Complainants.

Afterwards, on Monday, December 15th, 1884, the following entry appears of record:

BERTHOLD SCHLESINGER *et al.*
against } 401.
KANSAS CITY AND SOUTHERN R. R. Co.

18 This day comes complainants, by their solicitors, and, by leave of court first had and obtained, file herein their amended bill of complaint.

Said amended bill of complaint is in words and figures as follows:

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

To the honorable the judges of the circuit court of the United States for the western district of Missouri:

Your orators, Berthold Schlesinger and Sebastian Schlesinger, copartners doing business under the firm name and style of Naylor and Company and citizens of the State of Massachusetts, bring this their amended and supplemental bill of complaint against the Kansas City and Southern Railway Company, a corporation duly created by and existing under the laws of the State of Missouri and a citizen of said State of Missouri, and the Kansas City and Southern Construction Company, a corporation duly organized and existing under the laws of the State of Connecticut and a citizen of said State of Connecticut, and the Farmers' Loan and Trust Company, a corporation organized and existing under the laws of the

State of New York and a citizen of the State of New York, and James I. Brooks, a citizen of the State of Massachusetts.

And upon leave of court first had and obtained your orators allege:

I.

That at the times hereinafter mentioned your orators were and now are citizens of the State of Massachusetts and defendants construction company and Farmers' Loan and Trust Company
19 were citizens respectively of the States of Connecticut and New York, as hereinbefore alleged; that defendant railway company was organized June 10, A. D. 1880, and has since been a citizen of the State of Missouri, and that defendant James I. Brooks is a citizen of Connecticut.

II.

That heretofore, to wit, on the second day of March, A. D. 1880, and on the twenty-fourth day of May, A. D. 1880, and between said times, the defendant The Kansas City and Southern Construction Company was the owner and was seized and possessed under its said corporate name of certain property situate in the counties of Jackson, Cass, Henry, and St. Clair and other counties in the State of Missouri, and known as the Kansas City, Memphis and Mobile railroad, running from Kansas City, in Jackson county aforesaid, in the direction of the city of Memphis, in the State of Tennessee, together with all and singular the rights of way, roadbed, masonry, property, rights of property, and appurtenances whatsoever and wheresoever situated, belonging, or in anywise appertaining to said railroad, as also the franchise and right to construct, maintain, and operate upon and along said railroad and right of way a railroad, which said property was and is of the value of many thousand dollars.

III.

That heretofore, to wit, on said second day of March, A. D. 1880, your orators, under their firm name of Naylor and Company, entered into an agreement, in writing, with said defendant, The Kansas City and Southern Construction Company, whereby your orators agreed and became bound to furnish and supply to said defendant construction company, and said defendant construction company agreed and became bound to receive from your orators,
20 under their said firm name, five thousand tons of English and German steel rails, as nearly as may be—twelve hundred and fifty tons monthly, beginning April, 1880—at the price of fifty-one dollars, in bond, per ton, delivered in the city of New York, for the construction and equipment of said railroad by said defendant construction company, on the terms and conditions contained in said contract, and that in the execution thereof your orators immediately after the date of said contract began to purchase and send forward the said steel rails from Europe for the use of said

defendant construction company, and your orators purchased and had ready for delivery under the terms of said contract all of said steel rails; that said defendant construction company failed to comply with its said agreement and to receive and pay for said steel rails under said contract, whereby your orators were compelled to sell and did sell the same at a net loss and damage to your orators, after allowing said defendant construction company for all payments made on account of said contract, in the sum and amount of thirty-eight thousand and seven dollars and eighty-eight cents, and that said indebtedness and liability of said defendant construction company for said loss and damage aforesaid to your orators, under said contract, accrued and existed at the time of the execution of the conveyance by said defendant, The Kansas City and Southern Railroad Company, hereinafter mentioned.

IV.

That afterward, to wit, on the seventh day of October, A. D. 1881, your orators commenced an action under their said firm name against said defendant, The Kansas City and Southern Construction Company, in the circuit court of Jackson county, Missouri, on said liability and indebtedness of said defendant hereinbefore
21 set forth, by filing in the office of the clerk of said court, their petition against said defendant construction company, showing its indebtedness to your orators in and for the said sum of thirty-eight thousand and seven dollars and eighty-eight cents and interest thereon, and at the same time duly filed their affidavit and bond for an attachment against the property of said defendant construction company, and that thereupon and on said 7th day of October, 1881, an original writ of attachment and summons duly issued in said action out of the office of the clerk of said court, directed to the sheriff of said Jackson county, returnable on the first day of the next April term, 1882, of said court, commanding said sheriff to attach the lands, tenements, goods, chattels, rights, moneys, and effects of said defendant, The Kansas City and Southern Construction Company, or so much thereof as might be sufficient to satisfy your orators' said claim aforesaid, with interest and costs, and on the same day last aforesaid writs of attachment in said action duly issued to the counties of Cass, Henry, and St. Clair, in said State of Missouri, through which said railroad is located as aforesaid, and that said original writ of attachment and of summons was on said 7th day of October, 1881, delivered to said sheriff of Jackson county, and said sheriff duly executed said writ of attachment on said day last aforesaid by levying the same upon and by seizing and attaching as the property of the Kansas City and Southern Construction Company, to wit, all the right, title, and interest and property of said construction company in the Kansas City, Memphis and Mobile railroad, running from Kansas City, State of Missouri, in the direction of Memphis, in the State of Tennessee, with all and singular the right of way, road-bed, masonry, property,

rights of property, and appurtenances whatsoever and where-
22 soever situated of and belonging to or in anywise appertain-
ing to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company, and made on said day due return of said writ of attachment, and that said writ of summons was not served upon said defendant construction company because it could not be found in said Jackson county so that said process could be served upon it; that said writ of attachment so issued to said county of Cass was duly executed by the sheriff of said Cass county on the 12th day of October, 1881, by levying upon, seizing, and attaching as the property of the said Kansas City and Southern Construction Company, to wit, all the right, title, and interest and property of said construction company in the Kansas City, Memphis and Mobile railroad running from Kansas City, State of Missouri, in the direction of Memphis, in the State of Tennessee, with all and singular the right of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever and wheresoever situated of and belonging to or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company; that said writ of attachment so issued to the county of Henry aforesaid was duly executed by the sheriff of said Henry county of the 12th day of October, 1881, by levying upon, seizing, and attaching as the property of said Kansas City and Southern Construction Company the following property, to wit, all the right, title, and interest of said Kansas City and Southern Construction Company in the Kansas City, Memphis and Mobile railroad running from Kansas City, Missouri, in the direction of Memphis, in the State of Tennessee, together with all and singular the rights
of way, road-bed, masonry, property, rights of property,
22½ and appurtenances whatsoever and wheresoever situated and
belonging to or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company; that the writ of attachment so issued to said county of St. Clair was duly executed by the sheriff of said St. Clair county on the 11th day of October, 1881, by levying upon, seizing, and attaching, as the property of said Kansas City and Southern Construction Company, all the right, title, interest, and estate of the said Kansas City, Memphis and Mobile railroad running from Kansas City, State of Missouri, in the direction of Memphis, in the State of Tennessee, together with all and singular the right of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever and wheresoever situated of and belonging or in anywise appertaining to said railroad, together with all and singular the franchises of the Kansas City, Memphis and Mobile Railroad Company; and your orators aver and charge that the property so levied upon and attached by said sheriffs aforesaid under said writs of attachment was and is the entire road-bed, rights of way, masonry, property, and property rights of said Kansas City, Memphis and Mobile railroad and the franchises of said Kansas City, Memphis and Mobile railroad whatsoever — wheresoever situated,

and was and is the same property which the defendant railway company claims was conveyed to it by the deed dated May 24th, A. D. 1880, and the deed dated September 18, A. D. 1880, hereinafter set forth, and was and is all the property of whatsoever kind held or owned by said defendant construction company, and at the time of the execution of said contract by it and with your orators and of the accruing to your orators of the claim and liability against said defendant construction company, as hereinbefore mentioned;

23 that on the days on which said several sheriffs made the levies, seizures, and attachments hereinbefore stated they respectively and duly files in the office of the recorder of deeds in their respective counties abstracts of the attachments, levies, and seizures so made by them, showing the names of the parties to the suit, the amount of the debt sued for, the date of the levy, and a description of the property levied upon, as required by law.

V.

The defendant railway company was incorporated and created on June 10, A. D. 1880, and not before, under the general laws of Missouri by seven persons on that day making and signing, according to section 764 of the Revised Statutes of Missouri, articles of association; on which articles the affidavit required by section 766 of said Revised Statutes was endorsed, and which articles were, on June 10, 1880, filed in the office of the secretary of the State of Missouri and duly recorded. According to said articles of association said corporation is formed to construct, maintain, and operate a railroad from and commencing at Kansas City, in the county of Jackson, Missouri, and running thence in a southeasterly direction to the Big Blue river to a point at or near the confluence of Brush creek; thence along the valley of said Big Blue river to the southern boundary of said county; thence in a southeasterly direction along the valley of Mill creek to Grand river; thence along the valley of said Grand river through the counties of Cass and Henry, in Missouri, to the city of Clinton, in said Henry county, a distance of 84 miles. By its articles of association said railway company is not authorized to construct, maintain, or operate any other railroad or any railroad at all in said St. Clair county or anywhere south of Clinton, the county-seat of said Henry county.

24 Defendant construction company on May 12, 1880, executed and on the 24th day of May, 1880, its secretary and on May 31st, 1880, its president acknowledged a deed of conveyance which in terms purports to be made to the Kansas City and Southern Railroad Company for the expressed consideration of $300,000.00 of the capital stock of said railroad company to be issued to said construction company and $300,000.00 of first-mortgage bonds to be issued and paid by such railroad company to said construction company. Such deed so executed and acknowledged purports to convey to the grantee therein named, The Kansas City and Southern Railroad Company, all the property and franchises seized in attachment as hereinbefore stated and was recorded on June 12th, A. D.

1880, in the office of the recorder of said Jackson county and not before.

On July 23rd, A. D. 1884, there was filed for record in the recorder's office of said St. Clair county, and on July 30th, 1884, in the recorder's office of said Jackson county, an instrument in writing, dated September 18, 1880, whereby the Kansas City and Southern Construction Company for the recited consideration of $250,000 to it paid by said defendant railway company in terms remises, releases, and forever quitclaims to said railway company the property so attached by your orators as above stated. Said instrument, dated September 18, 1880, purports, according to the record, *purports* to be signed by the Kansas City and Southern Construction Company, by Henry Ashley, agent, and purports to be acknowledged by said Ashley on Sept. 18, 1880, as the deed of said construction company.

Your orators are unable to state when said last-mentioned instrument was delivered. Said deed of May 24th, 1880, was, as your orators are informed and believe and charge the truth
25 to be, intended by the grantor therein to be made and delivered to a railroad corporation thereafter to be created by several individuals, to bear the name of the Kansas City and Southern Railroad Company, but for some cause not understood by your orators no corporation of that name was ever formed, but some of the parties who contemplated the forming of such corporation, and perhaps others, formed, as above stated, said Kansas City and Southern Railway Company, and therefor- said last-named corporation got possession of said deed dated Mar. 24th, 1880, and caused same to be recorded as aforesaid. Said defendant railway company has since A. D. 1880 and now has possession of such property. Copies of said deeds dated May 24th, 1880, and September 18, 1880, are hereto attached as exhibits and made part of this bill of complaint.

Your orators charge that the defendant railroad company has never issued to said Kansas City and Southern Construction Company any certificate for any capital stock whatever, and that defendant railway company has never issued, delivered, nor paid to said defendant construction company any first-mortgage bonds nor bonds of any kind, and that defendant railway company has never paid to defendant construction company the $250,000 of money recited as paid in said deed of September 18, 1880, nor any part thereof, and that the consideration recited in each of said deeds remains wholly unpaid.

Your orators charge that the consideration recited in each of said deeds is wholly colorable, and that each of said deeds was made without any consideration whatever and each deed is and was a voluntary conveyance of said defendant construction company not upheld by any consideration, and that said defendant railway company now claims the title to the property purported to be passed by each of said deeds without having paid any consideration
26 whatever therefor, and that the property which each of said deeds purports to convey is the same property owned by said Kansas City and Southern Construction Company at the date of your orators' said contract and of the incurring of the liability to

your orators and of the accruing of the said claim for and upon which said attachment suit was brought in said circuit court of Jackson county, Missouri, and is the same property from Kansas City to the southern and eastern limits of said St. Clair county upon which the writs of attachment in said suit have been levied.

VI.

And your orators aver and charge that at the time of entering into said contract aforesaid and of the creation of the liability of said defendant construction company to your orator thereunder and of the accruing of the claim, demand, and charge of your orators as herein alleged that said property was all of the property and property rights owned and held by said defendant construction company, and that said defendant construction company had not at said time nor has it now any other property of any kind or any property rights out of which said claim, demand, liability, and charge of your said orators against it could or can be satisfied or paid in whole or in part, and that at said times and now said defendant construction company was and is wholly insolvent and unable to pay or satisfy your orators' said claim otherwise than out of said property and property rights aforesaid.

VII.

And your orators further charge and aver that said property and property rights of defendant construction company became and were bound in equity for the payment of your orators' claim and indebtedness aforesaid, and were and are a trust fund for the
27 satisfaction and discharge of the same, and that the Kansas City and Southern Railway Company received said deeds purporting to convey to it said property and property rights with full knowledge on the part of the officers managing and controlling said defendant railroad company at the time of said purchase of the existence of the said liability and indebtedness of said defendant construction compnay to your orators under said contract, as herein alleged, and said railway company became bound in equity and good conscience to pay off and fully satisfy the same.

And your orators well hoped that said railway company would so pay off and discharge said liability and indebtedness aforesaid.

But now so it is that said railway company utterly refuses to do so and claims said property in fee simply free from your orators' said claims against it and against said grantor; said railway company has, since said attachment writs were levied, executed and delivered to said defendant, Farmers' Loan and Trust Company, a deed of trust in the nature of a mortgage, conveying to said Farmers' Loan and Trust Company all of said property and property rights to secure payment of sixty-five hundred bonds of one thousand dollars each, to be issued by said defendant railway company, to be dated January 1st, 1883, and having been acknowledged in April, 1883, and been recorded in the office of the recorder of deeds of said Jackson county on May 5th, 1883. Your orators are

not advised whether or not any of said bonds have been issued, but state that said defendant, Farmers' Loan and Trust Company, claims a lien upon said property and property rights under said deed of trust, and charge that the lien, if any, under such deed
28 of trust, is junior and subordinate to the lien acquired by and under the levy of said writ of attachment. Said defendant railway company has possession of said property and property rights and is seeking and attempting to otherwise incumber said property and property rights and incurring liabilities and obligations the amount of which your orators are unable to state, but, as the- understand, such liabilities and obligations have been and are being incurred in and about the construction and extension of a railroad on said line of road and in operations connected therewith. Said Farmers' Loan and Trust Company at the time said deed of trust, dated January 1st, 1883, was made to and accepted by it had, as your orators are informed and charge the truth to be, actual notice of such lien and attachment suit of your orators and of the levies of said writs of attachment.

On May 11th, 1881, said Kansas City and Southern Construction Company, by its deed of that date, executed and acknowledged, conveyed to the defendant James I. Brooks all of said property and property rights in trust—

1. To secure to said Brooks the payment of indebtedness of every nature, cash or stock or bonds, due to said Brooks under the note whereby the said property was deeded by the said Brooks to said defendant construction company.

2. To secure the payment of any debts contracted by said construction company prior to the date of said conveyance of May 11th, 1881.

3. And after the execution of the above trusts to hold for the benefit of whom it may concern. Said last-mentioned deed was duly recorded in the office of the recorder of said Jackson county on May 21, 1881. A copy of such deed of May 11, 1881,
29 taken from the record, is herewith filed as an exhibit and made a part of this bill of complaint. By said deed of May 11, 1881, said defendant construction company, so far as it could, then undertook to and did secure the said claim of your orators on which they have brought said attachment suit. Your orators are informed and believe that such deed was not agreed to by some of the directors and stockholders in said defendant construction company, and that its validity is now contested by said defendant construction company, said defendant railway company, and said Farmers' Loan and Trust Company; but the grounds on which said contest is made your orators are now unable to state, but will hereafter, with permission of the court, when the- learn the same, state, with such facts thereto as they can truthfully allege.

Your orators are unable to state what claims said Brooks has against said defendant construction company or what claims held by him may be secured by said deed to him.

VIII.

By way of supplement your orators allege that after the commencement of said suit by attachment as aforesaid and on the 12th day of April, 1882, at the April term, 1882, of said Jackson county circuit court, said defendant construction company duly entered its appearance in said court in said action, and at said April term, A. D. 1882, and on the same day duly filed its answer to your orators' said petition in said cause, and afterward, to wit, on the 20th day of April, 1882, and at said April term, duly filed its affidavit, petition, and bond for removal of said cause to this court, which was accordingly done, and that said attachment suit is now pending and undetermined in this court — the law side thereof.

30 In consideration whereof, forasmuch as your orators are without any full, complete, and adequate remedy at law and can only have relief in a court of equity, where matters of this kind are cognizable and relievable, to the end, therefore, that said defendants may, if they can, show why your orators should not have the relief hereby prayed and may full and perfect answer make to all and singular the matters aforesaid, your orators therefore pray—

1. That said deeds of conveyance so made by said Kansas City and Southern Construction Company to said Kansas City and Southern Railroad Company, dated the 24th day of May, 1880, and recorded in the office of the recorder of deeds of said county of Jackson, Missouri, in Book B No. 45, at page 606 and following, and said deed, dated September 18, 1880, to said Kansas City and Southern Railway Company and said deed to the Farmers' Loan and Trust Company, dated January 1, 1883, may be by the decree and judgment of this court held and adjudged voluntary, fraudulent, and void as against the debt, claims, liabilities, and demands of your orators as hereinbefore set forth, and that by the decree and judgment of this court said deed and the record thereof may be cancelled, set aside, and for naught held as against said debts, claims, and liabilities and demands of your orators against said defendant construction company, and that said property and property rights of said defendant construction company attempted to be conveyed by said deeds and so levied upon, attached, and seized as aforesaid in said attachment proceedings be subjected to and charged with the claim, demand, debts, and liabilities of your orators aforesaid to the full extent thereof, together with interest and costs of said attachment proceedings and of this suit, and that said property be sold by the order and decree of this honorable court to satisfy, pay off, and discharge the same.

31 2. That in the meantime a receiver in chancery of said property and property rights be appointed by this court to take and retain possession, charge, and control of the same under the directions of this court during the pendency of this suit, and to take and receive the profits thereof, to pay all taxes or assessments thereon, and to fully preserve said property and property rights to answer the final decree of this court in the premises.

And that your orators may have such other and further relief in

the premises as the nature of the circumstances of this case may require and to your honors may seem meet.

And your orators will ever pray, may it please your honors, to grant unto your orators a writ of subpœna to be directed to the said Kansas City and Southern Railway Company and to the said Kansas City and Southern Construction Company and to the said Farmers' Loan and Trust Company and to said James I Brooks, commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before your honorable court, and then and there full and perfect answers make to all and singular the premises, and, further, to stand to, perform, and abide such further order, direction, and decree as to this honorable court shall seem agreeable to equity and good conscience in the premises.

GARDINER LATHROP,
Solicitor for Complainants.

JEFFERSON BRUMBACK, *Of Counsel.*

32 This indenture made and entered into this twenty-fourth day of May A. D. 1880 by and between the Kansas City and Southern Construction Company a corporation of the State of Connecticut, party of the first part, and the Kansas City and Southern Railroad Company a corporation of the State of Missouri, party of the second part, witnesseth, that for and in consideration of the transfer, to said party of the first part by said party of the second part of three hundred thousand dollars of the capital stock of the said party of the second part and of the issue of certificates therefor to said party of the first part by said party of the second part and for the further consideration of the transfer and payment to said party of the first part by said party of the second part of three hundred thousand dollars of the first-mortgage bonds to be issued by said party of the second part and secured by mortgage on the property hereby conveyed with all other property of said party of the second part acquired or to be acquired said party of the first part hereby transfers conveys, bargains, and sells and assigns to said party of the second part the following-described property namely, the Kansas City, Memphis and Mobile railroad running from Kansas City, Jackson county and State of Missouri in the direction of Memphis in the State of Tennessee and Mobile in the State of Alabama, through the States of Missouri and Arkansas together with all and singular the rights of way, road-bed, masonry, property, rights of property and appurtenances whatsoever or wheresoever situated of and belonging or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company.

To have and to hold the said property hereby conveyed
33 unto the said party of the second part and its assigns forever.

In witness whereof, we, James I. Brooks as president and George B. Ripley as secretary of the Kansas City and Southern Construction Company by direction of the board of directors thereof have

hereunto subscribed our names and caused the common seal of said Kansas City and Southern Construction Company to be hereunto affixed this twenty-fourth day of May 1880.

[CORPORATE SEAL.] JAMES I. BROOKS,
President of the Kansas City and Southern Construction Company.
GEO. B. RIPLEY,
Secretary of Kansas City and Southern Construction Company,
By GEORGE B. RIPLEY.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Charles Edgar Mills, a commissioner duly appointed by the governor of the State of Missouri to take the acknowledgment and proof of deeds and other instruments to be recorded in said State of Missouri, do hereby certify that George B. Ripley, secretary, who is personally known to me to be such officer and to be the identical person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that, as the secretary of the Kansas City and South ernConstruction Company, he signed, sealed, and delivered the foregoing instrument, with the corporate seal of the said Kansas City and Southern Construction Company thereto affixed, as the free and voluntary act and deed of the said company for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this 24th day of May, A. D. 1880.

[S. S.] CHARLES EDGAR MILLS,
Commissioner for Missouri in New York,
117 *Broadway, N. Y. City.*

34 STATE OF MISSOURI, }
County of Jackson, } *ss:*

Be it remembered that this day personally appeared before me, the undersigned, — within and for the county and State above written, James I. Brooks, who is personally known to the undersigned to be the same person whose name as president of the Kansas City and Southern Construction Company is subscribed to the foregoing deed, and acknowledged that he executed, attached the common seal of said construction company to, and delivered the same as the voluntary act and deed of Kansas City and Southern Construction Company for the uses and purposes therein contained. I certify my commission expires Jan'y 13, 1883.

In witness whereof I have hereunto set my hand and affixed my notarial seal. Done at office, in Kansas City, Mo., this 31st day of May, 1880.

[SEAL.] ED. L. SCARRITT,
Notary Public.

35 This indenture, *may* the eighteenth day of September in the year of our Lord one thousand eight hundred and eighty,

between the Kansas City and Southern Construction Company, a corporation of the State of Connecticut, party of the first part, and the Kansas City and Southern Railway Company, a corporation of the State of Missouri, party of the second part, witnesseth, that the said party of the first part for and in consideration of the sum of two hundred and fifty thousand dollars lawful money of the United States of America to it in hand paid by the said party of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged hath remised, released and quitclaimed and by these presents *doth* remise, release and quitclaim unto the said party of the second part and to its successors and assigns forever *i. e.* the following property namely the Kansas City, Memphis and Mobile railroad running from Kansas City, Jackson county and State of Missouri in the direction of Memphis in the State of Tennessee and Mobile in the State of Alabama through the States of Missouri and Arkansas together with all and singular the rights of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever or wheresoever situated and belonging or in anywise appertaining to said railroad together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversions remainder and remainders rents, issues and profits thereof, this also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part of in and to the above-described premises and every part and parcel thereof, with the appur-
36 tenances, to have and to hold all and singular the above mentioned and described premises together with the appurtenances unto the said party of the second part its successors and assigns forever.

In witness whereof the Kansas City and Southern Construction Company hath caused this indenture to be signed and its corporate seal hereto affixed by its agent Henry Ashley thereto duly authorized by corporate vote, the day and year first above written.

[L. S.] THE KANSAS CITY AND SOUTHERN CONSTRUCTION COMPANY,
By HENRY ASHLEY, *Agent.*

Attest: GEO. B. RIPLEY, *Secretary.*

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Be it remembered that on this 18th day of September, A. D. 1880, before me, Charles Nettleton, a commissioner of the State of Missouri for the State of New York, residing in said city of New York, personally appeared Henry Ashley, the agent of the Kansas City and Southern Company, to me personally known to be such, who, being by me duly sworn, did depose and say that he resided in Catskill, New York; that he was agent of the said company; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so af-

fixed thereto by order of the board of directors of said company, and that he signed his name thereto by the like order as the agent of said Kansas City and Southern Construction Company.

In witness whereof I have hereunto set my hand and affixed my official seal this 18th day of September, A. D. 1880.

[L. S.] CHARLES NETTLETON,
Commissioner for Missouri in New York,
117 *Broadway, N. Y. City.*

37 Know all men by these presents that the Kansas City and Southern Construction Company, a corporation duly organized under the laws of the State of Connecticut, in consideration of one dollar and other good and valuable considerations to it paid by James I. Brooks, of Boston, in the Commonwealth of Massachusetts, the receipt of which is hereby acknowledged, by virtue of a vote of the directors of said corporation, passed at a meeting duly called and held, which said vote appears upon the records of said corporation, and by virtue of every other power it hereto enabling, hereby gives, grants, bargains, sells, conveys, remises, releases, and forever quitclaims to and unto James I. Brooks aforesaid the following-described property, known as the Kansas City, Memphis and Mobile railroad, running from Kansas City, in Jackson county, in the State of Missouri, in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, through the States of Missouri and Arkansas, together with all and singular the rights of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever or wheresoever situated of and belonging or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company.

To have and to hold said property unto the said James I. Brooks and his heirs and assigns forever, but in trust for the uses and purposes hereinafter set forth. Said trusts are to secure to the said James I. Brooks the payment to him of all indebtedness of whatsoever nature, whether in cash or stock or bonds due said Brooks under the vote whereby the property herein conveyed was deeded by said Brooks to the Kansas City and Southern Construction Company to the date of this conveyance; third, after the execution of the above trusts, to hold the same for the benefit of whom it may concern.

38 In witness whereof the said corporation has caused these presents to be signed by James I. Brooks, its president, and Henry B. Crane, its secretary, ind its corporate seal to be hereto affixed this eleventh day of May, A. D. 1881.

[SEAL.] KANSAS CITY AND SOUTHERN CONSTRUCTION CO.,
By JAMES I. BROOKS, *President.*
HENRY B. CRANE, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Suffolk, City of Boston, }

Be it remembered that on this thirteenth day of May, A. D. 1881, before me, Samuel Jenneson, a commissioner of the State of Missouri residing in Boston, duly commissioned and qualified under the laws of said State to take acknowledgments of deeds, &c., to be used or recorded therein, personally came James I. Brooks, president, and Henry B. Crane, secretary of the Kansas City and Southern Construction Company, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as having executed the same in behalf of the said company, the corporation therein described, as a party thereto, and they acknowledged the same to be their act and deed and the act and deed of said corporation for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and
[SEAL.] official seal, at said Boston, this 13th day of May, A. D. 1881.

SAMUEL JENNISON,
Commissioner for Missouri in Boston.

Afterwards, to wit, on the 31st day of December, A. D.
39 1884, the following order was entered of record:

BERTHOLD SCHLESINGER *et al.* }
against } 401.
K. C. & S. R. R. Co. }

Ordered that defendant have leave to file answer herein by next rule day.

And afterwards, to wit, on the 2nd day of February, A. D. 1885, the following entry was made of record:

BERTHOLD SCHLESINGER *et al.* }
against } 401.
K. C. & S. R. R. Co. }

This day comes the defendant, by its solicitors, and files answer herein.

It is ordered by the court that the hearing of the application for a receiver herein be continued until the first Monday in April next.

Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

ADOLPH SCHLESINGER and SEBASTIAN SCHLESINGER, Complainants,
against
KANSAS CITY AND SOUTHERN RAILWAY COMPANY, KANSAS CITY and Southern Construction Company, and Farmers' Loan and Trust Company, Defendants.

The answer of The Kansas City and Southern Railway Company, of the defendants, to the bill of complaint of Berthold Schlesinger and Seastian Schlesinger, the complainants.

This defendant, The Kansas City and Southern Railway Company, saving and reserving — itself, now and at all times hereafter, all
40 and all manner of benefit and exception which can or may be had or taken to the said complainants' said bill of complaint, for answer thereto or to so much thereof as this defendant is advised is in any way material or necessary for it to make answer unto, answers and says that whether the defendant James I. Brooks is a citizen of Connecticut or complainants are citizens of the State of Massachusetts or are doing business under the firm name of Naylor and Company this defendant has no knowledge or information sufficient to form a belief or opinion of the truth or falsehood of said alleged facts, and it demands proof of the same; this defendant says that it is not true that at the times mentioned in said bill of complaint or at any other time the defendant The Kansas City and Southern Construction Company *or* was seized or possessed of, under its corporate name or otherwise, *of* the said Kansas City, Memphis and Mobile railroad or any part or portion thereof or interest in the rights of way, road-bed, masonry, property, or rights of property or any appurtenances belonging to or in anywise appertaining to said railroad, or any right and franchise to construct, maintain, or operate along said railroad or right of way a railroad, but this defendant avers that at any of the times mentioned in said bill of complaint or at any time the said Kansas City, Memphis and Mobile Railroad Company had no property whatever save as is hereinafter set forth and described.

And defendant, herein answering, avers the fact to be that defendant The Kansas City and Southern Construction Company was a corporation organized under and by virtue of the general laws of the State of Connecticut, as set forth in the revised laws of said State of Connecticut for the year A. D. 1875, known as the
41 Revised Statutes of Connecticut for the year A. D. 1875, concerning "joint stock companies," which statute and the amendment thereto enacted prior to the — day of March, A. D. 1880 form part of the charter of said Kansas City and Southern Construction Company; that said Kansas City and Southern Construction Company filed its articles of association setting forth that it was organized for the purpose of purchasing and selling railroad stocks, railroad bonds, and other securities, and to make advances

in money to railroad and other improvement, mining, and manufacturing companies, and to enter into contracts for the construction of railroads and of all kinds of public works, and also to aid contractors, miners, and manufacturers, and to endorse and guarantee the payment of the bonds and the performance of the obligations of individuals, companies, and corporations, and to buy, sell, and deal in any real or personal property necessary or convenient in the prosecution of said business, and to do all things incidental to said business and its management, and for no other purpose whatever, and had no authority, right, or franchise to engage in or carry on any business involving or concerning buying and selling of real estate or any other business matters or transactions whatsoever, or to acquire or hold any property, real, personal, or mixed, or any right, interest, or franchises save such as might be necessary for the transaction of said business aforesaid as it was organized, in accordance with the laws of Connecticut, for the purpose of transacting, or to acquire real estate outside of the State of Connecticut save such as might be necessary for the carrying on of any such business in the State where such real estate might be situated as it, the said Kansas City and Southern Construction Company, might then be carrying on lawfully in said State of Connecticut, and this defendant avers that said Kansas City and Southern Construction Company did not
42 at any time prior to the institution of this suit carry on in the State of Connecticut any of the aforesaid kinds of business which by its charter aforesaid it was authorized to carry on, only keeping an office and books and papers: and this defendant further avers that said Kansas City, Memphis & Mobile Railway Company was a corporation organized under and by virtue of the laws of the State of Missouri solely and only for the purpose of constructing, maintaining, and operating a railroad in said State of Missouri and elsewhere on the extension of its line and had not at any time any right, franchise, privilege, or permission to engage in or carry on any other business whatever, and that the only property, real, personal, or mixed, or franchise, right, or other property ever held by the said Kansas City, Memphis and Mobile Railroad Company consisted of and was a way and right of way for its said intended railroad, certain easements necessary for and appurtenant to the construction, maintenance, and operation of its said intended railroad, and the franchises, rights, and privileges conferred upon and vested in it by said law of the State of Missouri, all of which way, rights of way, easements, and franchises were held and owned by it only to the extent and so far as they and each of them were necessary to the constructing, maintaining, and operating its said railroad in accordance with its charter and the laws of the State of Missouri affecting it, its rights, privileges, and property. This defendant further avers that the alleged ownership of the said Kansas City and Southern Construction Company set forth by complainants in their bill of complaint of "the Kansas City, Memphis and Mobile railroad,"
"together with all and singular the rights of way, road-bed,
43 masonry, property, and rights of property and appurtenances whatever and wheresoever situated belonging to or in any-

wise appertaining to said railroad, as also the right and franchise to construct, maintain, and operate upon and along said railroad and right of way a railroad," is solely and only based upon and asserted to exist by virtue and reason and because of the following pretended facts and transactions (and not otherwise and because of any other facts, true or pretended acts, or matters) alleged by the complainants and the said The Kansas City and Southern Construction Company: That the said Kansas City, Memphis and Mobile Railway Company was by a court of competent jurisdiction duly adjudged a bankrupt under and by virtue of the laws of the United States of America concerning bankruptcy then in force and its property became vested in its assignees in bankruptcy to be held and used in accordance with law and under the order and control of said court last mentioned; that in due course and under and by aut-ority in it vested said court ordered a sale of the property, rights, franchises of the said Kansas City, Memphis and Mobile Railroad Company by the assignee- in bankruptcy; that said assignees duly made such sale and sold said property, rights, and franchises of every kind and description whatever to one John D. Bancroft, and said Kansas City and Southern Railway Company now claims said property and franchises thereof through mesne conveyances from said Bancroft outside of and independent of any conveyance or pretended conveyance of said Kansas City and Southern Construction Co. to said Kansas City and Southern Railway Company. This defendant, further answering complainants' bill of complaint, avers that as to whether the complainants or said firm of Naylor and Co. entered into any agreement in writing with
44 defendant The Kansas City and Southern Construction Company, or whereby complainants became bound to supply to said construction company or the latter agreed or became bound to receive from complainants five thousand tons or any steel or other rails in any quantity, or at the times or any other time, place, or price, or for the construction of said railroad or at all, or on the terms and conditions alleged in said bill or on any terms or conditions, or that in execution of any such contract or at all, at any time, complainants began or did purchase or send forward from Europe or elsewhere, for use of defendant, said construction company, or at all, or had any or all of said rails, or that said defendant construction company failed to comply with any agreement concerning said rails or any such agreement as is alleged or recited in said bill of complaint, or that complainants were compelled to sell or did sell same, or at a net or other loss or damage to them, or after allowing said construction company for any payments made on account of said alleged contract in the sum or amount of thirty-eight thousand and seven dollars and eighty-eight cents, or any other sum or amount, or that said alleged indebtedness or liability of said defendant construction company accrued or existed at the time of said alleged execution of said alleged conveyance by said defendant construction company to said defendant, Kansas City and Southern Railroad Company, this defendant, hereby and herein answering, has no knowledge or information sufficient to form a belief or opinion

of the truth or falsehood of said alleged facts, and it demands proof of said alleged and pretended matters and acts; but this defendant avers that it is not true that there was or is such a company or corporation as the Kansas City and Southern Railroad Company, and that there is any such named person or corporation a de-
45 fendant to this suit, either actually of record or by privity, or that any such person or corporation was grantee or beneficiary in any conveyance whatsoever.

This defendant admits that complainants on, to wit, the 7th day of October, A. D. 1881, commenced a suit by attachment against the defendant The Kansas City and Southern Construction Company in said circuit court of Jackson county on said alleged liability and indebtedness, as stated in said bill of complaint, and issued writs of attachment to said several sheriffs, as stated in said bill, and that said sheriffs made the returns on said writs set forth in said bill of complaint, but this defendant says it is not true that said sheriffs, or any of them, duly or at all executed all or any of said writs of attachment or levied said writs on any property whatever, because said Kansas City, Memphis and Mobile Railroad Company had no property save a right of way for its railroad and certain easements and franchises held and enjoyed by it as and for the purpose of constructing, maintaining, and operating a railroad under the laws of the State of Missouri, and that said Kansas City, Memphis and Mobile Railroad Company is a corporation duly organized under the laws of the State of Missouri for the purpose of constructing, maintaining, and operating a railroad in said State of Missouri and elsewhere, and for no other purpose, and the only property which said writs of attachment or any of them was claimed or pretended to have been levied on by said sheriffs or any of them consi-ted solely and only of said last-mentioned right of way, easements, and franchises, and this defendant is advised that neither said right of way, easements, or franchises or any of them is subject to levy on or under any writ of attachment, and that said pretended levies are each
46 and all utterly void and of no effect; and this defendant says that it is not true that said property so pretended to have been levied on consi-ted of masonry or of any property, rights of property, road-bed, or appurtenances or franchises other than the right of way, easements, or franchises of said Kansas City, Memphis and Mobile Railroad Company hereinbefore mentioned by this defendant as being the property it had and owned, as will be more fully hereinafter stated; and it denies that said defendant construction company ever held or owned any of the said property last mentioned by any valid title or claim or at all or at the time of the execution of said pretended contract with complainants or of the accruing to complainants of any pretended claim or liability against said defendant construction company; and this defendant says that it has no knowledge or information sufficient to form a belief or opinion in regard to the truth or falsity whether abstracts of said attachments, levies, or seizures as described in said bill were filed in the office of any recorder of deeds, as stated in said bill.

Defendant admits that it was incorporated and at the time men-

tioned in said bill of complaint for the purpose of constructing and operating said railroad therein described except as hereinafter set forth; but this defendant says it is not true that said railway company is not authorized to construct, maintain, or operate any other railroad or railroads at all in said St. Clair county or anywhere south of Clinton aforesaid.

This defendant admits that said defendant construction company on May 12th, 1880, executed the deed described in said bill of complaint as executed of that date to the Kansas City and Southern Railroad Company, but says that such a person, association,
47 or corporation as the said Kansas City and Southern Railroad Company never existed, and that said deed is therefore null and void.

This defendant admits that on July 23rd, 1884, there was filed for record in the recorder's office in said Jackson county the instrument of writing or deed described in said bill of complaint as being "dated Sept. 18, 1880." As to the intention of the grantor in said deed of May 24, 1880, mentioned in said bill of complaint, this defendant has no knowledge or information sufficient to form an opinion as to whether it was as stated by complainants in their said bill or not, but this defendant says it is not true that it has since A. D. 1880 claimed or now claims any or all of said property so (claimed to have been) attached under both of said deeds.

This defendant denies that it got possession of any deed dated May 24th, 1880, and caused same to be recorded.

This defendant admits that it never issued any certificate for stock to said Kansas City and Southern Construction Company nor paid to it the sum of $250,000 mentioned in said bill of complaint, but it avers that it never received any consideration for the delivery of said stock or the payment of said money; that the said Kansas City and Southern Construction Company pretended to this defendant to be the owner of certain rights of way and franchises and property and to be authorized to convey the same to this defendant and did agree and promise to convey the same, and in consequence of such agreement and representations did obtain from this defendant one hundred thousand dollars of its income bonds, which were the only bonds ever promised by this defendant to said defendant construction company.

The said construction company, in order to render the income bonds of any value, subsequently released the defendant railway company from any obligations to issue said stock.

48 This defendant denies that either of the deeds mentioned in said bill of complaint as having been executed by said Kansas City and Southern Construction Company was without consideration or was or is a voluntary conveyance of said construction company or not upheld by any consideration, or that this defendant claims title to any property purporting to be passed by each of said deeds without having paid any consideration therefor. Defendant admits that said deeds assume to convey, among other property, the property owned by this defendant, but this defendant does not derive its title to its said property under said deeds.

This defendant says it is not true that the property last named was at the time of entering into said alleged contract by complainants or of any liability of defendant, said construction company, thereunder, if any such existed, or of the accruing of any such claim, demand, or charge, if any such accrued, "the property was all of the property and property rights owned or held by defendant," said construction company, and this defendant avers that said last-mentioned property never was held or owned by said defendant construction company, and that it was incapable of holding and owning the same. This defendant admits that said construction company has no property in Missouri or elsewhere as this defendant knows of, but whether or not the said construction company or its legal representatives has no other property or stock subscriptions out of which complainants could make their claim, if they have any, this defendant has no knowledge sufficient to enable him to form an opinion.

Defendant denies that any of said property became or was bound for the payment of any claim of complainants, or indebted-
49 ness, or was or is a trust fund for satisfaction or discharge of the same, or that this defendant received said deeds purporting to convey said property or rights, or with full or any knowledge of said alleged or any indebtedness of said construction company to complainants on the part of the officers managing or control-ing this defendant, and this defendant has no knowledge or information sufficient to form an opinion or belief as to any purchase of said alleged liabilities or indebtedness of said defendant construction company to complainants, and it (this defendant) denies that in equity or good conscience it become or is bound to pay off or fully or partially satisfy the same.

This defendant denies that complainants hoped or expected that it would pay off their said alleged claim.

This defendant says that it is true that it refused to pay off said alleged claim and that it claims said property in fee simple and free of any claim of complainants against it or said construction company; that this defendant has executed to the Farmers' Loan and Trust Company a deed of trust to secure bonds as stated in said bill of complaint, and that said deed bears date and was recorded as stated in said petition, and that said Farmers' Loan and Trust Company claims a lien on said property under said deed, but this defendant denies that said lien is junior to any acquired under said so-called levies of said writs of attachments, and denies that any legal or valid levy was made of said writs mentioned.

This defendant admits it is in possession of said property, but says it is in possession of no other property, and denies that it is seeking to "otherwise" or anywise encumber the same, and this defendant is advised that the other liabilities or obligations it may incur do not in any way affect complainants or their said
50 alleged claims.

Defendant on information and belief avers that the Farmers' Loan and Trust Company did accept said last-mentioned conveyance or mortgage, but denies that when it did so accept said deed

last mentioned it had actual or any notice of said alleged claim or attachment suit of complainants or of the so-called levies of said writs of attachment.

This defendant denies that said Kansas City and Southern Construction Company did on May 11th, 1881, convey any of said property or property rights to said James I. Brooks or for the purpose stated in said bill of complaint, or then undertook or did secure said alleged claim of complainants as is stated in said bill; and this defendant denies the validity of any such pretended deed.

This defendant denies that said construction company entered its appearance in said attachment suit or filed any answer in said suit as alleged in said bill of complaint, and avers that if any such appearance was entered or any answer in its behalf filed it was without the authority of said construction company and such entry is utterly unauthorized and will be declared void by said construction company, as defendant is informed and believes.

This defendant admits that said attachment suit was removed to this court and is now pending therein, as stated in said bill of complaint.

It denies that complainants have not any full, complete, and adequate remedy at law, but say- that they have a full, complete, and adequate remedy at law for any judgment or relief in the premises to which they may be entitled on the facts.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by said bill of com-
51 plaint charged, without this, that there is any other matter, cause, or thing in said complainants' said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge of this defendant; all which matters and things this defendant is willing to aver and maintain and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

KANSAS CITY & SOUTHERN RAILWAY CO.,
By WILLIAM BAILEY, *Its President.*
WALDO P. JOHNSON,
JOHNSON & LUCAS,
JOHN O'GRADY, *Of Counsel.*

UNITED STATES OF AMERICA,)
Western District of Missouri,) *ss:*

William Bailey, being duly sworn, on his oath says that he is the president of the defendant The Kansas City and Southern Railway Company and in charge of its affairs, and that the facts stated in the foregoing answer of the said Kansas City and Southern Railway Company are true to the best of affiant's knowledge, information, and belief.

WILLIAM BAILEY.

Subscribed and sworn to before me by the said William Bailey on this 31st day of January, A. D. 1885, at my office, in the city of Kansas.

[SEAL.] WARREN WATSON,
Com'r U. S. Cir. C't, West. Dist. Mo.

52 Afterwards, to wit, on the 6th day of April, A. D. 1885, the following entry was made of record:

BERTHOLD SCHLESINGER *et al.*
against } 401.
KANSAS CITY & SOUTHERN R'Y CO.

This day come complainants, by their solicitors, and file replication to the answer of defendant.

Said replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Complainants,
vs.
KANSAS CITY AND SOUTHERN RAILWAY COMPANY, Kansas City and Southern Construction Company, and Farmers' Loan and Trust Company, Defendants. } In Equity. No. 401.

The Replication of the Complainants to the Answer of the Kansas City and Southern Railway Company.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be ans-ered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants;

Without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be
53 replied to and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

JEFF. BRUMBACK &
GARDINER LATHROP,
Solicitors for Complainants.

And afterwards, to wit, on Wednesday, the 10th day of June, A. D. 1885, the following entry was made of record:

B. SCHLESINGER *et al.*
against
K. C. & S. R. R. Co. } 401.

Leave is granted to both parties to take testimony until 90 days after the next term of this court.

And on Tuesday, October 20th, A. D. 1890, the following further entry was made of record:

Now comes Messrs. Botsford & Williams and withdraw their appearance as solicitors for defendant herein.

And on the first day of February, A. D. 1886, the following entry appears of record:

BERTHOLD SCHLESINGER *et al.*
against
K. C. & S. R'Y Co. } 401.

Ordered that defendant have leave to file amended answer herein by April rules.

54 And afterwards, to wit, on the 7th day of April, A. D. 1887, the following supplemental bill was filed by leave, to wit:

In the Circuit Court of the United States, Western District of Missouri, Western Division.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners Doing Business under the Firm Name and Style of Naylor & Company,

v.

KANSAS CITY & SOUTHERN RAILWAY COMPANY, THE KANSAS City & Southern Construction Company, The Farmers' Loan and Trust Company, and James I. Brooks.

Supplemental Bill.

Your orators, the complainants above named, by leave of court bring this supplemental bill against the respondents above named, and thereupon your orators complain and say—

That since the filing of the original bill and of the amended and supplemental bill of complaint herein such proceedings have been had in the case of your orators as plaintiffs against The Kansas City & Southern Construction Company as defendant in the action at law by attachment mentioned in said bill as that heretofore, to wit, on the first day of February, 1886, your orators recovered judgment against the said The Kansas City & Southern Construction Company for the sum of thirty-five thousand nine hundred one and $\frac{39}{100}$ dollars ($35,901.39), together with costs and charges, and by said judgment your orators were awarded execution, and it was adjudged that the judgment and execution thereon should hold not only the property theretofore attached in said action *of* law, but the other

property of the defendant in said action; but it was further
55 provided that execution should not issue without special leave of court until after final decree in chancery in this cause; all of which will more fully and at large appear by reference to the proceedings in said attachment suit and to the record of said judgment, all of which are of record in this court and are here referred to for greater certainty.

Wherefore your orators pray for decree as in their original and in their amended and supplemental bill.

JEFFERSON BRUMBACK,
Solicitor for Complainant.

GEO. W. McCRARY, *Of Counsel.*

And afterwards, on the 20th day of May, 1887, the following applications were filed and orders made thereon:

In the Circuit Court of the United States within and for the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners as Naylor & Co., *v.* THE KANSAS CITY & SOUTHERN RAILWAY COMPANY, The Kansas City & Southern Construction Company, The Farmers' Loan & Trust Company, and James I. Brooks.	Equity.

Now come the complainants above named and represent to the court that this is a bill in equity brought for the purpose of enforcing the collection of a certain judgment at law obtained by complainants in this court against the respondent The Kansas City & Southern Construction Company, a corporation of the State of Connecticut, which judgment was rendered on the first day of February, 1886, as appears by the record thereof, which is referred to.

The complainants claim that said judgment is a lien in
56 equity upon certain property particularly described in the bill, and pray, among other things, for a decree directing the sale of said property for the purpose of paying said judgment.

Complainants further state that the said The Kansas City & Southern Construction Company is a non-resident corporation and insolvent, and complainants are informed and believe that it has at the present time no officers upon whom service of subpœna can be made. Complainants state that the said Kansas City & Southern Construction Company was represented in said action at law by John O'Grady, Esq., an attorney of this court, as its attorney, as will be seen by the record of said action at law, which is here referred to; and, inasmuch as the present bill is ancillary to the said action at law and not an original or independent proceeding, complainants pray for an order directing the service of subpœna in this suit against said Kansas City & Southern Construction Company upon the said John O'Grady, Esq., as its attorney, and that such service

when made shall answer as a substitute for actual service upon said company.

J. BRUMBACK & GEO. W. McCRARY,
Solicitors for Complainants.

UNITED STATES OF AMERICA,
Western District of Missouri, Western Division, } ss:

Frank F. Brumback, being duly sworn, on oath states that the statements contained in the foregoing application are true, as he verily believes.

FRANK F. BRUMBACK.

Subscribed and sworn to before me this 18 day of May, 1887. Witness my hand and official seal.

[SEAL.] I. P. DANA,
Notary Public in and for Jackson County, Mo.

57 In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners as Naylor & Co.
v.
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY, THE KANSAS City & Southern Construction Company, The Farmers' Loan & Trust Company, and James I. Brooks.

Upon the hearing of the foregoing application it is ordered by the court that service of subpœna in this suit as against the defendant — John O'Grady, Esq., attorney for said company, and that such service, when made, shall answer as a substitute for actual service upon said company.

DAVID J. BREWER, *Judge.*

In the Circuit Court of the United States, Western District of Missouri, Western Division.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners as Naylor & Company,
v.
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY, THE KANSAS City and Southern Construction Company, The Farmers' Loan & Trust Co., and James I. Brooks.

Come now the complainants and represent to the court that this is a suit to enforce an equitable lien upon the property de-
58 scribed in the bill, to wit, certain property situated in the counties of Jackson, Cass, Henry, and St. Clair and in other counties in the State of Missouri and within the said judicial district and known as the Kansas City, Memphis and Mobile railroad, running from Kansas City, in the county of Jackson aforesaid, in the direction of Memphis, in the State of Tennessee, together with

all and singular the rights of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever and wheresoever situated belonging or in anywise appertaining to said railroad, as also the franchise and right to construct, maintain, and operate upon and along said railroad and right of way a railroad; all which said property is within the western division of the western district of Missouri.

That the defendant The Farmers' Loan & Trust Company is not an inhabitant of or found within the said district and has not voluntarily appeared in this case; that the said Farmers' Loan & Trust Company claims an interest in the property above described under and by virtue of a deed of trust executed to it, as stated in complainants' bill, which interest, as the complainants allege, is subject and subordinate to that of the complainants; that the said Farmers' Loan & Trust Company is a corporation of the State of New York, and can, as complainants believe, be personally served at its office in the city of New York.

Wherefore complainants pray for an order directing the said Farmers' Loan & Trust Company, respondent, to appear, plead, answer, or demur to the bill herein by a day certain to be designated, the said order to be served upon the said Farmers' Loan & Trust Company wherever found and also upon the person or persons in possession or charge of said property, if any there be.

J. BRUMBACK &
GEO. W. McCRARY,
Solicitors for Complainants.

59 UNITED STATES OF AMERICA, } ss:
Western District of Missouri, Western Division, }

Geo. W. McCrary, being duly sworn, on his oath states that he is one of the solicitors for complainant in this cause, and that the statements contained in the foregoing application are true, as he verily believes.

GEO. W. McCRARY.

Subscribed and sworn to before me this 18th day of May, 1887. Witness my hand and official seal.

[SEAL.] FRED. P. BARNETT,
Notary Public, Jackson Co., Mo.

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners as Naylor & Company,
v.
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY, THE KANSAS City & Southern Construction Company, The Farmers' Loan & Trust Company, and James I. Brooks.

Upon the hearing of the foregoing application it is ordered that the said The Farmers' Loan & Trust Company, defendant herein, be

directed to appear, plead, answer, or demur to the complainants' bill on or before the first, 1st, day of July, A. D. 1887, and that a copy of this order, together with a copy of the above application, shall be served upon the defendant The Farmers' Loan & Trust Company wherever found.

DAVID J. BREWER, *Judge*.

60 Thereupon a certified copy of said last-named application and order was made, which was returned served and filed on the 27th day of May, 1887.

In the Circuit Court of the United States, Western District of Missouri, Western Division.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners as Naylor & Company,

v.

THE KANSAS CITY & SOUTHERN RAILWAY COMPANY, THE Kansas City & Southern Construction Company, The Farmers' Loan & Trust Company, and James I. Brooks.

Come now the said complainants and represent to the court that this is a suit to enforce an equitable lien upon the property described in the bill, to wit, certain property situated in the counties of Jackson, Cass, Henry, and St. Clair, and in other counties in the State of Missouri and within the said judicial district, and known as the Kansas City, Memphis and Mobile railroad, running from Kansas City, in the county of Jackson aforesaid, in the direction of Memphis, in the State of Tennessee, together with all and singular the rights of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever and wheresoever situated belonging or in anywise appertaining to said railroad, as also the franchise and right to construct, maintain, and operate*d* upon and along said railroad and right of way a railroad, all which property is within the western division of the western district of Missouri.

That the defendant The Farmers' Loan & Trust Company is not an inhabitant of or found within the said district and has
61 not voluntarily appeared in this cause; that the said Farmers' Loan & Trust Company claims an interest in the property above described referred to, and, inasmuch as the present bill is ancillary to the said action at law and not an original or independent proceeding, complainants pray for an order directing service of subpœna in this suit against said Kansas City & Southern Construction Company, upon the said John O'Grady, Esq., as its attorney, and that such service when made shall answer as a substitute for actual service upon said company.

J. BRUMBACK &
GEO. W. McCRARY,
Solicitors for Complainants.

UNITED STATES OF AMERICA,
Western District of Missouri, Western Division.

Frank F. Brumback, being duly sworn, on oath states that the statements contained in the foregoing application are true as he verily believes.

FRANK F. BRUMBACK.

Subscribed and sworn to before me this 18 day of May, 1887. Witness my hand and official seal.

[SEAL.]

I. P. DANA,
Notary Public in and for Jackson County, Mo.

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners as Naylor & Co.,
v.
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY, THE
62 Kansas City and Southern Construction Company, The Farmers' Loan & Trust Company, and James I. Brooks.

Upon the hearing of the foregoing application it is ordered by the court that service of subpœna in this suit as against the defendant The Kansas City & Southern Construction Company be made upon John O'Grady, Esq., attorney for said company, and that such service when made shall answer as a substitute for actual service upon said company.

DAVID J. BREWER, *Judge.*

UNITED STATES OF AMERICA, *set:*

I, Warren Watson, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the foregoing is a true copy of the application and order for personal service in the cause therein named as fully as the same appears in my office.

Witness my hand as clerk, and the seal of said court.

[SEAL.] Done at office, in the city of Kansas, Missouri, this 21 day of May, A. D. 1887.

WARREN WATSON, *Clerk.*

I hereby certify that on the 24th day of May, 1887, at the city of New York, in my district, I personally served the within-certified copy of the application and order upon the within-named The Farmers' Loan and Trust Company by delivering to and leaving with Rosewell G. Rolston, president of said company, a certified copy thereof.

Dated New York, May 24th, 1887.

M. T. McMAHON,
63 *United States Marshal, Southern District of New York,*
By GEO. H. HOLMES, *Deputy.*

And on the 26th day of May, 1887, a subpœna was issued from the office of the clerk of the United States for the western division of the western district of Missouri in words and figures as follows:

UNITED STATES OF AMERICA, }
Western Division of the Western District of Missouri, } *sct:*

The President of the United States of America to John O'Grady, attorney of the Kansas City & Southern Construction Company, Greeting:

You are hereby commanded to be and appear at the office of the clerk of the circuit court of the United States for the western division of the western district of Missouri, on the first day of July next, at the city of Kansas, then and there to answer the amended bill of complaint of Berthold Schlesinger & Sebastian Schlesinger, partners as Naylor & Co., citizens of the State of Mass., filed against you on the 15th day of Dec., A. D. 1884; hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 26th day of May, A. D. 1887.

Issued at office, in the city of Kansas, under the seal of said court, the day and year last aforesaid.

[SEAL.]

WARREN WATSON,
Clerk of said Circuit Court,
By A. UTTER, *D. C.*

MEM.—The defendant to enter appearance in this suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso.*

64

WARREN WATSON, *Clerk,*
By A. UTTER, *D. C.*

The return on said writ is in words and figures as follows:

UNITED STATES OF AMERICA, }
Western Division of the Eastern Judicial District of Missouri, } *sct:*

I do hereby certify that I executed this writ by delivering a certified copy of same to John O'Grady, attorney of the Kansas City & Southern Construction Company, on the 20th day of June, A. D. 1887, at St. Louis, in above district.

J. E. F. COUZINS,
U. S. Marshal, Eastern District of Missouri,
By WALTER ATKINSON, *Deputy.*

And on the 27th day of May, A. D. 1887, the following entry was made of record, to wit:

BERTHOLD SCHLESINGER
against
K. C. & S. W. R'Y CO. } 401.

This day comes defendant Brooks and files answer.

Said answer is in words and figures as follows:

Circuit Court of the United States for the Eastern District of Missouri, Western Division.

BARTHOLD SCHLESINGER *et al.*
vs.
THE KANSAS CITY AND SOUTHERN RAILWAY COMPANY *et al.*

The Answer of James I. Brooks, One of the Parties Defendant.

1. Said defendant, in answer to paragraph I of the bill, says that he is and always has been a citizen of Massachusetts
65 and not of Connecticut, as alleged, and otherwise he believes the averments of said paragraph to be true.

2. In answer to paragraph II he says that he believes the averments thereof to be true except that said Kansas City and Southern Construction Company was not, as alleged, the owner of the property therein referred to on the 2nd day of March, 1880, but became such owner only by conveyance from this defendant on or about April 1, 1880.

3. In answer to paragraph III defendant says that he admits the execution of the contract described in said paragraph, and he admits that 1,470 tons of the iron contracted for in said contract was manufactured and shipped and was tendered to the said construction company and was sold for account of said construction company at his request as president of said company, acting on its behalf. Prior to the time of giving such order to sell the rails aforesaid, your orator, said Naylor & Co., agreed that no further shipments should be made or action taken under said contract until further instructions were given them by your orator, and that at that time and at any subsequent period the fifty thousand dollars deposited with Naylor & Co. on account of the said contract was more than sufficient to pay any loss suffered or sustained by said Naylor & Co.; and as to the other averments in said paragraph this defendant is ignorant and calls for proof of the same if they be material.

4. In answer to paragraph IV defendant says that he is ignorant whether the averments contained therein are true, and calls for proof of the same if material.

5. In answer to paragraph V this defendant admits that the Kansas City and Southern Railway Company was organized, as alleged, and that the conveyance of May 12, 1880, to the Kansas City
66 & Southern Railroad Company was executed but was never delivered, said corporation never having been formed, and was recorded without authority by the person who had it in his custody; and he further says upon information and belief that the

deed dated September 18, 1880, whereby the Kansas City & Southern Construction Company purports to convey to the defendant railway company the property therein described is not the de-d of the said construction company and was executed and delivered without any authority from said company, and the seal affixed thereto was not the seal of said company, and that the party assuming to sign it as agent of said company was never authorized to act for said company in that behalf; and he further says that the consideration of two hundred and fifty thousand dollars alleged to have been received by said construction company was never in fact so received by said construction company or paid by said railway company.

6. In answer to paragraph VI your orator avers on information and belief that there was other property and property rights held by said construction company, but as to the other allegations the respondent is ignorant and can neither affirm nor deny, and leaves plaintiff to prove the same.

7. In answer to paragraph VII he says that he does not know what the rights of the plaintiffs may have been against the property of the said construction company, nor whether said railway company had notice of such rights, if any there were; and this defendant does not know and has never before heard that the said railway company had attempted to convey said property of said construction company to the Farmers' Loan and Trust Company to secure its bonds, and says that if such conveyance purports to have been made it is wholly void and without effect, because
67 said railway company has never acquired title to said property; and this defendant admits that on May 11, 1881, said construction company did, by deed duly executed, convey all said property to this defendant, in trust, as alleged in the bill, and this defendant now holds the title thereto upon the trusts of said deed.

8. And this defendant further alleges that on the first day of April, A. D. 1880, he made a contract with the Kansas City and Southern Construction Company, whereby, in consideration of a certain sum to be paid in cash and of the issue to him of one hundred and fifty thousand dollars of its common stock and one hundred thousand dollars of its preferred stock, both at par, he was to convey to said construction company the property known as the Kansas City, Memphis & Mobile railroad, and that he did so convey said property and received said common and preferred stocks and now holds the same, but did not receive the whole of said cash payment, and that a large amount thereof now remains due to him; and he further alleges that on or about April 9, 1880, he was duly chosen a director and president of said construction company and has continued in those offices ever since; but that in August or September, 1880, about the time of the pretended conveyance to the said railway company, the secretary of the company and one of the directors, having possession of the records of the company and being interested in said railway company, undertook to turn over to said railway company the property of said construction company without the consent of its directors or of a majority of its stock-

holders and in fraud of its creditors and stockholders; and he avers that upon production of said records, if they have been truly and faithfully kept, it will appear that no lawful authority was
68 ever given to any one to convey the property of said construction company to said railway company, and that said property is still the property of said construction company except so far as may be needed to pay the liabilities to secure which it was conveyed to this defendant May 18, 1881, as above set forth.

JAMES I. BROOKS.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

BOSTON, *February* 17, 1885.

Personally appeared James I. Brooks and made solemn oath that the statements above made as of his own knowledge are true and the statements made upon information and belief he believes to be true. Before me—

[SEAL.] WALTER C. COGSWELL.
Notary Public.

And afterwards, on the 1st day of August, 1887, the following entry was made of record:

BERTHOLD SCHLESINGER *et al.*
against } 401.
K. C. & S. RAILROAD COMPANY.

This day comes defendant Farmers' Loan and Trust Company and files answer to original bill and also to supplemental bill.

Said answers are in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners as Naylor & Company,
vs.
THE KANSAS CITY AND SOUTHERN RAILWAY COMPANY, THE Kansas City and Southern Construction Company, The Farmers' Loan and Trust Company, and James I. Brooks.

69 The answer of the Farmers' Loan and Trust Company to the amended and supplemental bill of complaint of Berthold Schlesinger and Sebastian Schlesinger, partners as Naylor & Company, or to so much and such parts thereof as it is advised that it is material to make answer unto, answering, says:

I. This defendant reserves to itself the benefit of all and every advantage of exception to the manifold uncertainties and insufficiencies in the said bill of complaint contained.

II. This defendant says that it has no knowledge or information sufficient to form a belief as to whether the plaintiffs are partners doing business under the firm name and style of Naylor and Com-

pany and as to whether the plaintiffs are citizens of the State of Massachusetts, and it therefore denies the said allegations of the bill and leaves the plaintiffs to make such proof thereby as they may be advised. It admits that the Kansas City and Southern Railway Company is a corporation duly created and organized under the laws of the State of Missouri; but it does not admit that the particulars of date are correctly set forth in the bill, and prays leave of the court to prove the particulars of such organization as the same may appear by the documentary and other evidence relating to the organization of such corporation. It denies all knowledge or information sufficient to form a belief as to whether the Kansas City and Southern Construction Company is a corporation duly organized and existing under the laws of the State of Connecticut and a citizen of said State of Connecticut, and it therefore denies said allegations of the bill and leaves the complainant- to make such proof thereof as they may be advised. It admits that the Farmers' Loan and Trust Company is a corporation duly
70 organized and existing under the laws of the State of New York and a citizen of the State of New York. It denies all knowledge or information sufficient to form a belief as to whether James I. Brooks is a citizen of the State of Massachusetts, and therefore denies said allegation of the bill and leaves the plaintiffs to make such proof thereof as they may be advised.

III. This defendant says that it has no knowledge or information sufficient to form a belief as to each and every of the allegations contained in the paragraph numbered II of said bill of complaint, and it therefore denies each and every of said allegations and leaves the plaintiff- to make such proof thereof as they may be advised. The said allegations relate to the ownership of the Kansas City and Southern Construction Company on the second day of March, 1880, on the 24th day of May, 1880, and between said times of certain property particularly described in said paragraph of said bill, together with the rights, interests, and franchises therein set forth, which said property is alleged to be of the value of many thousand dollars.

IV. The defendant says that it has no knowledge or information sufficient to form a belief as to each and every of the allegations contained in the paragraph numbered III of said bill of complaint, and it therefore denies each and every of said allegations and leaves the plaintiffs to make such proof thereof as they may be advised. The said allegations relate to a certain contract alleged to have been made by the plaintiffs with the defendant The Kansas City and Southern Construction Company for the delivery to said company of certain English and German steel rails, beginning in April, 1880, and concerning the purchase and delivery by the plaintiffs of said rails, and concerning the alleged failure of said construction
71 company to comply with said agreement and receive and pay for said rails, and concerning the alleged sale of said rails at a loss to the plaintiffs, which said loss is alleged to amount to three thousand eight hundred and seven dollars and eighty-eight cents.

V. This defendant says it has no knowledge or information sufficient to form a belief as to each and every of the allegations contained in the paragraph numbered IV of said bill of complaint, and it therefore denies each and every of said allegations and leaves the plaintiffs to make such proof thereof as they may be advised. The said allegations relate to a certain action alleged to have been commenced by plaintiffs against the defendant The Kansas City and Southern Construction Company in the circuit court of Jackson county, Missouri, and the proceedings had upon said action, including certain writs of attachment issued therein, and concerning the property alleged to have been attached pursuant to said writs, and including an allegation that the said property is the same which the defendant railroad claimed was conveyed to it by a deed dated May 24, 1880, and a deed dated September 18, 1880, subsequently set forth in said bill, and that said property was all the property held by the defendant construction company at the time of its contract with the plaintiffs, and also including an allegation in respect to the several acts done by the several sheriffs who made the alleged levie*d*, seizures, and attachments.

VI. This defendant admits that the defendant railway company is a corporation duly created by and under the laws of the State of Missouri; but this defendant denies all knowledge or information sufficient to form a belief as to each and every of the allegations contained in the paragraph numbered V of said bill of com-
72 plaint, and it therefore denies the same and leaves the plaintiffs to make such proof thereof as they may be advised. The said allegations relate to the mode, time, and manner of the incorporation of the defendant railway company and the particulars of the railway that said company was authorized to construct. As to all of said allegations this defendant prays leave to refer to the documentary and other evidence whereby said incorporation was effected, and this defendant does not admit that the substance thereof is correctly set forth in the bill. The said allegations of paragraph V also relate to a certain conveyance executed on May 12, 1880, made by the defendant construction company to the Kansas City and Southern Railroad Company; also concerning the record of said deed, said allegations also relating to the filing for record in St. Clair county of an instrument in writing dated September 18, 1880, whereby the Kansas City and Southern Construction Company released and quitclaimed to the defendant railway company certain property, and particularly setting forth the mode of execution and acknowledgment of said deed, said paragraph V also alleging want of knowledge on the part of the plaintiffs as to the time of delivery of said instrument, and relating also to the intentions of the grantor in said instrument and to an alleged failure to form a corporation to be called the Kansas City and Southern Railroad Company, and concerning the formation of the Kansas City and Southern Railway Company, and concerning the possession of said deed and the recording of the same, and concerning the claims made by the railway company to the ownership of certain property alleged to have been attached and the ownership of cer-

tain deeds and the possession of said property, and concerning the alleged copies of said deed attached as exhibits and made part of the bill of complaint, said allegations of paragraph V of said bill also relating to a certain charge made by the plaintiffs
73 that the defendant railway company has never issued to the Kansas City and Southern Construction Company any certificate of capital stock and has never issued any bonds and has never paid to the construction company a certain sum of money, and that the consideration of a certain deed dated September 18, 1880, remains unpaid, said allegations of paragraph V of said bill also charging that the consideration recited in each of said deeds is wholly colorable, and that each of said deeds is made without any consideration and is a voluntary conveyance by the construction company, and that the railway company now claims the title to certain property purporting to be passed by each of said deeds without paying consideration, and that the property which each of said deeds purports to convey is the same property owned by the construction company at the date of the plaintiffs' contract and of the incurring of the liability to the plaintiffs and of the accruing of the claim for and upon which the attachments were brought and upon which writs of attachment levied.

VII. This defendant denies all knowledge or information sufficient to form a belief as to each and every of the allegations contained in the paragraph numbered VI of said bill of complaint, and it therefore denies the same and leaves the plaintiffs to make such proof thereof as they may be advised. The said allegations relate to the property and property rights which were owned and held by the construction company at the time of the accruing of the plaintiffs' claim, and allege also the insolvency of the construction company.

VIII. This defendant denies all knowledge or information sufficient to form a belief as to each and every of the allegations contained in the paragraph numbered VII of said bill of complaint, save as to one allegation hereinafter excepted, and it there-
74 fore denies the same and leaves the plaintiffs to make such proofs thereof as they may be advised. The said allegations relate to the property and rights of the defendant construction company, the plaintiffs claiming a lien thereon and a trust in their favor, and that the defendant railway company received the deeds mentioned in the bill with full knowledge of the existence of the indebtedness of the defendant construction company to the plaintiffs, and that the railroad company became bound to pay said indebtedness, and that the railroad company refuses so to do and claims said property in fee simple, free from the claim of the plaintiffs, said allegations of paragraph VII relating also to the alleged priority of said attachment writs to a certain deed of trust in the nature of a mortgage alleged to convey to said Farmers' Loan and Trust Company all the said property and property rights to secure the payment of sixty-five hundred bonds of one thousand dollars each, to be dated January 1, 1883, said deed of trust being dated January, 1883, and concerning want of knowledge on the part of the plaintiffs as to whether any of said bonds have been issued and stating

that the lien claimed by the trust company under such deed of trust is subordinate to the lien acquired by the levy of said attachment, and concerning the possession by the defendant railway company of the property attached and its alleged attempts to encumber said property, said allegations of said paragraph numbered VII of said bill also concerning a certain deed alleged to have been made by the Kansas City and Southern Construction Company to one James I. Brooks, and concerning the purposes of the record of the same, and concerning an alleged copy of said deed, which is made part of the bill, and concerning the purposes of said deed, and concerning the want of agreement to said deed by some of the directors and stockholders in said construction company, and concerning an *an* alleged contest in relation to its validity.

75 But this defendant denies the allegation contained in said paragraph VII of the bill which is to the effect that the Farmers' Loan and Trust Company, at the time that said deed of trust dated January 1, 1883, was made and accepted by it, had, as you orators are informed and charge the truth, actual notice of said claim and attachment suit of your orators and of the recent levies of said writs of attachment.

IX. This defendant denies all knowledge or information sufficient to form a belief as to each and every of the allegations contained in paragraph numbered VIII of said bill of complaint, and it therefore denies the same and leaves the plaintiffs to make such proof thereof as they may be advised. The said allegations relate to certain proceedings had in said suit which was commenced by attachment, including the removal of said suit into this court.

X. This defendant further alleges that by indenture dated the first day of January, 1883, made by and between the Kansas City and Southern Railway Company and this defendant, the railway of said company and its franchises and other property particularly described in said indenture were conveyed to this defendant; that said indenture constituted a mortgage or deed of trust intended to secure an issue of six thousand five hundred negotiable bonds for one thousand dollars each, and this defendant is informed and believes and therefore alleges that fifteen hundred and six of said bonds secured by said deed of trust or mortgage have been issued to purchasers in good faith and for value; and this defendant further alleges that it had not, at the time of the acceptance of said deed of trust or mortgage or at the time the same was recorded or at the time said bonds were

76 issued, any knowledge or notice of the alleged rights or claim of the plaintiffs, and this defendant is informed and believes that the purchasers of said bonds had no such notice, and this defendant claims such right under and by virtue of such deed of trust or mortgage as it is entitled to, and it alleges that its said rights are prior to any claims of the plaintiffs in and to the property alleged to have been affected by the proceedings taken by the plaintiffs; and this defendant further alleges that said mortgage or deed of trust was duly recorded in the several counties in which the property covered thereby is situated, as in and by said original

mortgage or deed of trust, or a certified copy thereof, with the certificate of recording of the same, ready to be produced as this court shall direct, will more fully and at large appear.

XI. This defendant, further answering, denies each and every other allegation in the said bill of complaint not hereinbefore admitted, controverted, or denied; and without this, that any other matter or thing in the said bill of complaint contained material or necessary to make answer unto and not herein and hereby well and sufficiently answered unto confessed and avoided, traversed or denied, is true to the knowledge or belief of this defendant; all of which this defendant is willing to aver, maintain, and prove as this honorable court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE FARMERS' LOAN & TRUST COMPANY,
[SEAL.] By R. G. ROLSTON, *ss.*

GAGE, LADD & SMALL AND
TURNER, LEE & McCLURE,
Sol'rs for Def't F. L. & T. Co., 20 *Nassau St., New York.*
HERBERT B. TURNER,
B. F. LEE, *Of Counsel.*

77 STATE OF NEW YORK,
County of New York, Southern District of New York, } *ss:*

I, Roswell G. Rolston, being duly sworn, depose and say that I am the president of The Farmers' Loan and Trust Company, the defendant above named, and have been such president for a number of years past; that I have read the foregoing answer and know the contents thereof, and that the same is true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

I further say that the reason that this verification is not made by the said defendant is that it is a corporation; that I am an officer of the same, to wit, the president, and that my knowledge is derived from having taken part in the transactions spoken of and otherwise, and the grounds of my belief are information communicated to me by the agents of said corporation and others. I further say that the seal affixed to said answer is the corporate seal of said defendant and was by me affixed to the same by the authority of said corporation.

R. G. ROLSTON.

Subscribed and sworn to before me this 27th day of July, 1887.

JOHN McCLURE,
[SEAL.] *Notary Public, N. Y. Co.*

78 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners as Naylor & Company,

vs.

THE KANSAS CITY AND SOUTHERN RAILWAY COMPANY, THE Kansas City and Southern Construction Company, The Farmers' Loan and Trust Company, and James I. Brooks.

The answer of the Farmers' Loan and Trust Company to the supplemental bill of complaint of Berthold Schlesinger and Sebastian Schlesinger, partners as Naylor and Company, filed April 7, 1887, or to so much and such parts thereof as it is advised that it is material to make answer unto, answering, says:

I. This defendant reserves to itself the benefit of all and every advantage of exception to the manifold uncertainties and insufficiencies in the said bill of complaint contained.

II. This defendant denies all knowledge or information sufficient to form a belief as to each and every of the allegations of the said supplemental bill, and it therefore denies the same and leaves the plaintiffs to make such proof thereof as they may be advised. Said allegations relate to the recovery of a certain judgment by the plaintiffs against the Kansas City and Southern Construction Company.

III. This defendant, further answering, denies each and every other allegation in the said bill of complaint not hereinbefore admitted, controverted, or denied, and without this, that any other matter or thing in the said bill of complaint contained material or necessary to make answer unto and not herein and hereby
79 well and sufficiently answered unto, confessed and avoided, traversed or denied, is true to the knowledge of belief of this defendant; all of which this defendant is willing to aver, maintain, and prove as this honorable court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE FARMERS' LOAN AND TRUST COMPANY,
[SEAL.] By R. G. ROLSTON, *President.*

GAGE, LADD & SMALL AND
TURNER, LEE & McCLURE,
Solicitors for Def't F. L. & T. Co.,
20 Nassau Street, New York.
HERBERT B. TURNER,
B. F. LEE, *Of Counsel.*

STATE OF NEW YORK, }
County of New York, Southern District of New York, } *ss:*

I, Roswell G. Rolston, being duly sworn, depose and say that I am the president of The Farmers' Loan and Trust Company, the defendant above named, and have been such president for a number

of years past; that I have read the foregoing answer and know the contents thereof, and that the same is true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

I further say that the reason why this verification is not made by the said defendant is that it is a corporation; that I am an officer of the same, to wit, the president, and that my knowledge is derived from having taken my part in the transaction spoken of and
80 otherwise, and the grounds of my belief are information communicated to me by the agents of said corporation and others. I further say that the seal affixed to said answer is the corporate seal of said defendant and was by me affixed to the same by authority of said corporation.

R. G. ROLSTON.

Subscribed and sworn to before me this 27 day of July, 1887.

JOHN McCLURE,
[SEAL.] *Notary Public, N. Y.*

And afterwards, to wit, on the 8th day of September, 1887, a replication was filed in words and figures as follows:

In the Circuit Court of the United States for the Western District of Mo., Western Division.

BERTHOLD SCHLESINGER & SEBASTIAN SCHLESINGER, Complainants,
vs.
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY, KANSAS City & Southern Construction Company, The Farmers' Loan & Trust Company, and James I. Brooks, Defendants.

The Replication of Complainants to the Answers of the Farmers' Loan and Trust Company and James I. Brooks.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answers and each of them, for replication thereunto say that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answers of said defendants are uncertain, untrue, and insufficient to be replied unto by these repliants;
81 without this, that any other matter or thing whatsoever in the said answers or in either of them contained material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court

shall direct, and humbly pray as in and by their said bill they have already prayed.

JEFFERSON BRUMBACK,
GEO. W. McCRARY,
Solicitors for Complainants.

Afterwards, to wit, at the regular October term, 1887, and on the 20th day of October, the following entry was made of record:

B. SCHLESINGER *et al.*
against
K. C. & S. CONST. Co. } 401.

By consent this cause is continued.

And afterwards, at said term and on the 24th day of October, 1887, the following further entry was made of record:

B. SCHLESINGER *et al.*
against
K. C. & S. RAILWAY Co. } 401.

This day comes complainant, by solicitor, and *takes* leave to take testimony till April 1st next.

And afterwards, at the May term, A. D. 1888, and on the 21st day of May, the following entry was made of record:

BERTHOLD SCHLESINGER *et al.*
against
K. C. & S. R'Y Co. } 401.

This day a stipulation of parties is filed continuing this cause
82 until such time in October as Judge Brewer can hear the same. Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western District of Missouri, Western Division, at Kansas City.

BERTHOLD SCHLESINGER *et al.*, Complainants,
v.
THE KANSAS CITY & SOUTHERN RAILWAY Co. *et al.*, Respondents. }

It is hereby agreed that this cause shall be heard upon final hearing before the circuit judge any time in the month of October which may be designated by him and at any place he may fix for such hearing.

It is further agreed that the time for taking testimony shall be extended until ten days before the time thus fixed for the hearing.

Witness our hands this 10th day of April, 1888.

J. BRUMBACK,
GEO. W. McCRARY,
Solicitors for Complainants.
JOHN O'GRADY,
Solicitors for Defendants.

And afterwards, at the regular October term, 1888, and on the 22nd day of October, the following entry was made of record:

BERTHOLD SCHLESINGER *et al.*
against
K. C. & S. CONSTRUCTION CO. *et al.* } 401.

This day come the parties, by their solicitors, and file stipu-
83 lation continuing this cause and extending the time for taking testimony until twenty days before the first day of the next term.

Said stipulation is in words and figures as follows:

In the Circuit Court U. S., Western District of Missouri, Western Division.

SCHLESINGER
vs.
KANSAS CITY & SOUTHERN CONSTRUCTION COMPANY, Kansas City and Southern Railway Company, *et al.* } No. 401. Ch'y.

It is agreed that this cause be continued and that the time for taking testimony be extended until twenty days before the next term of this court.

GEO. W. McCRARY,
For Complainants.
JOHN O'GRADY,
For Respondents.

And afterwards, to wit, on the 12th day of February, 1889, a stipulation was filed in words and figures as follows, to wit:

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER *et al.*, Complainants,
v.
KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*, Respondents. } No. 401.

Stipulation.

It is hereby stipulated and agreed that the following evidence may be read at the trial of this cause, subject to all objections as to competency and relevancy:

1. The deposition taken in the case of the plaintiffs herein against the Kansas City and Southern Construction Com-
84 pany, action at law by attachment, in this court.

2. Copies of reports made by the defendant The Kansas City & Southern Railway Company to the board of railroad commissioners of the State of Missouri, certified by the secretary of said board.

It being understood, however, that either party claiming the said copies to be in any respect incorrect may produce the originals thereof on the trial.

Witness our hands this 17th day of December, 1888.

J. BRUMBACK &
GEO. W. McCRARY,
Solicitors for Complainants.
JOHN O'GRADY &
C. O. TICHENOR,
Solicitors for Defendants.

And afterwards, to wit, on the 4th day of March, 1889, the following stipulation was filed:

In the Circuit Court of the United States for the Western District of Missouri, Western Division, at Kansas City.

BERTHOLD SCHLESINGER *et al.*, Complainants,
vs.
KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

Stipulation.

It is stipulated that this case is to be tried at the next March term, 1889, of said court and on such date as may be fixed by the circuit judge by an order to be entered of record on the first day of said term, such trial to be not later than the 24th day of April next.

Dated this 19th day of February, 1889.

85

J. BRUMBACK &
G. W. McCRARY,
Attorneys for Complainants.
C. O. TICHENOR &
J. O'GRADY,
Attorneys for Defendants.

Set for April 24th.
D. J. BREWER,
Circuit Judge.

And afterwards, to wit, on the 4th day of May, 1889, the following stipulation was filed:

In the United States Circuit Court, at Kansas City, Mo.

B. SCHLESINGER *et al.*, Complainants,
vs.
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*, Respondents.

It is agreed and stipulated by and between the parties hereto that the Kansas City & Southern Railway Company has built its railroad on the line of property heretofore attached in the case of Naylor & Co., and that said railroad is now completed between Kansas City,

in Jackson county, and Osceola, in St. Clair county, and trains are running and being operated thereon, the distance being about one hundred and eleven miles.

C. O. TICHENOR &
JOHN O'GRADY,
Sol's for Respondents.
J. BRUMBACK &
G. W. McCRARY,
Sol'rs for Complainants.

Afterwards, to wit, on the 6th day of May, A. D. 1889, the cause was called, heard, and submitted to the court and by the court taken under advisement.

86 And afterwards, to wit, on the 24th day of September, A. D. 1889, an opinion was filed in words and figures as follows, to wit:

87 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

B. SCHLESINGER *et al.*
against
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*

Opinion.

BREWER, *C. J.:*

This is a suit in equity brought to charge certain property in the hands of the defendant railway company with the payment of a judgment in favor of complainants and against the defendant construction company. The property sought to be charged is the right of way, road-bed, masonry, etc., formerly belonging to the Kansas City, Memphis and Mobile Railway Company and now in the possession and use of the defendant railway company. In the early part of 1876 the Kansas City, Memphis and Mobile Railway Company, which had constructed and then owned the property in question, was thrown into bankruptcy and the property conveyed to assignees in bankruptcy. At that time several miles of road had been graded and many thousand dollars expended in masonry and culverts. On Apr. 25, 1877, the assignees in bankruptcy, in pursuance of orders of the court, sold and conveyed the property to John D. Bancroft for $15,025. The purchase was made for the benefit of a few gentlemen, merchants and having business interests in Kansas City, who purchased not with a view of completing the road themselves or of speculation in the purchase, but to secure its construction and control in the interests of Kansas City.

88 On the 27th day of April, 1877, Bancroft conveyed the property to Thomas K. Hanna, Benjamin McLean, and John D. Bancroft as trustees for the parties interested in the purchase. These gentlemen held the title until January 13, 1880, when they conveyed it to James I. Brooks for the cash consideration of

$19,156.87 and upon certain terms and conditions. Mr. Brooks purchased for the defendant construction company, to which in a few days he conveyed the property. The conditions of the conveyance from the trustees and through which defendant construction company received title are these:

"Subject, however, to the following conditions: Said party of the second part is to build said railroad from Kansas City to Harrisonville or Belton, as said second party may elect, on or before January 1, 1881, so as to be ready for use as a railroad, and also to complete said railroad to the coal-fields of Bates county, to a point south of Butler, on or before July 1, 1881, so as to be ready for like use as aforesaid; and if said second party shall fail to build said railroad to said coal-fields as aforesaid, then the property so to be sold as aforesaid shall revert to said first party and reinvest in them the same as they now hold the same: Provided, however, that as soon as said second party shall expend the sum of fifty thousand dollars in the construction of said road-bed for said railroad commencing at Kansas City and running southwardly, then the said provision shall become null and void and of no effect whatever; and upon said expenditure being made in the building of said railroad as aforesaid by said second party of said sum of fifty thousand dollars, then said trustees are to execute to said second party or its assigns an instrument in writing acknowledging the waiver and extinguishment of said forfeiture."

89 On September 18, 1880, a conveyance of the property was executed in the name of the defendant construction company to the defendant railway company, which deed, though attested by the secretary and seal of the company, was signed only by one Henry D. Ashley as agent of the construction company. The consideration expressed in this deed was two hundred and fifty thousand dollars. On December 15, 1880, this instrument was executed by the trustees and beneficiaries to the railway company:

"Whereas, the Kansas City, Memphis & Mobile railroad, with all its road-bed, rights of way, appurtenances and property, and rights of property, whatsoever, connected with said railroad with all the franchises of the Kansas City, Memphis & Mobile Railroad Company were by deed dated January 13, 1880, sold and conveyed by the undersigned trustees to one J. I. Brooks, on certain conditions expressed and contained in said deed, and whereas the title to said property subject to the said conditions has by sundry mesne conveyances passed to and vested in and is now owned and held by the Kansas City & Southern Railway Company, and whereas, said last-named Co., has not been able to comply with and perform said conditions, within the time specified in said first-named deed for their performance; but is now willing to deposit and has deposited with said trustees, the sum of $25,000, as a guaranty by said last-named company of the good faith of its purpose to build a railroad southeastwardly from Kansas City, Mo., through the coal fields of Henry county, Mo., and the iron fields of St. Clair county, Mo., the receipt of which sum of $25,000, by said trustees is hereby acknowledged, and whereas, since the making of said deed to said J. I.

Brooks, various sums of money have been expended for
90 rights of way, engineering, and other necessary expenses connected with the enterprise of building said railroad, in addition to the purchase price paid to said trustees on the execution of said first-named deed by them, and whereas the owners of more than two-thirds of the money and shares furnished by the persons and firm named in the deed of said property to said trustees, dated April 27, 1877, have directed the undersigned trustees to execute and deliver this instrument to said Kansas City & Southern Railroad Co.

Now, therefore, in consideration of the premises and of the sum of one dollar to said trustees by said Kansas City & Southern Railway Co. in hand paid; the receipt whereof is hereby acknowledged; it is agreed, stipulated and covenanted by and between said trustees for themselves and their said beneficiaries and said K. C. & S. Railway Co. as follows:

1. The conditions, provided and expressed in said deed of said trustees to said J. I. Brooks, are hereby annulled, rescinded and extinguished and the said K. C. & S. Railway Company are hereby released and forever discharged from the performance of the same, or any part thereof, and in lieu thereof the following conditions are hereby provided, that is to say: Said trustees, or a majority of them, shall as said railroad from Kansas City, southeastwardly through the coal fields of Henry county, Mo., and the iron fields of St. Clair county, Mo., shall be constructed, pay out said $25,000, in the estimates and orders made and given in the building of said railroad by the chief engineer of said K. C. & S. Railway Co., and as soon as said $25,000 is so paid out and the additional sum of $15,000 is expended by said last-named Co. in the building of said railroad, then said last-named Co. shall hold said property so conveyed free from any and all claim of whatsoever kind on the part of said
91 trustees or their beneficiaries or any of them.

2. It is further provided and covenanted that if said last-named Co. shall not expend the full sum of $25,000 in the building of said railroad before July 1, 1881, then so much of said $25,000 so deposited as shall, on the day last aforesaid, be unexpended, shall be forfeited to and become the money and property of said trustees for the benefit of their beneficiaries.

3. It is further provided and covenanted that as soon as said $25,000 so deposited shall be paid out and as soon as the chief engineer of said last-named Co. shall make his certificate of expenditure by said last-named Co. of said additional $15,000 in the building of said railroad, which sum of $15,000 shall be expended before October 1, 1881; then said trustees shall deliver to said last-named Co. an instrument of writing, duly executed and acknowledged evidencing the full compliance of all the conditions herein contained by said last-named Co., and if the sum of $40,000 shall not as above provided be expended by said Co. before October 1, 1881, then said property shall revert to said trustees as by said deed to said Brooks is provided."

After this the defendant railway company took possession of the

property and has completed and in operation the line of railroad. On March 2, 1880, after the purchase by the defendant construction company it contracted with complainants for the purchase of five thousand tons of steel rails at fifty-one dollars per ton, on which contract it paid complainants $50,000. Little more than two months thereafter, on May 10, 1880, finding itself unable to complete the contract, the construction company authorized the complainants to sell the rails for its account without in any way prejudicing
92 their claim for damages against the company. No rails were ever in fact delivered to or received by the construction company, but, the price of rails having depreciated quite rapidly, the complainants sold them much below fifty-one dollars and presented a claim for damages above the fifty thousand dollars received in the neighborhood of forty thousand dollars. Suit was commenced on this claim on October 7, 1881, writs of attachment issued and levied upon the property in question, and on February 1, 1886, complainants recovered judgment against the construction company for $35,901.39; and it is to enforce that judgment that this suit is brought.

The contention of complainants is that the deed signed by Henry D. Ashley was ineffectual to pass the title away from the defendant construction company, and therefore it still remains in the construction company and subject to this judgment; or, if it be true that the construction company did part with its title, that it was a conveyance in fraud of the rights of these complainants as creditors because it was a conveyance without consideration of all its property. As a matter of fact, this was all the property the construction company had, and the judgment rendered shows that it was in debt to complainants; so that in this respect the questions presented are whether the construction company has conveyed away its title, and, if so, whether the transaction is void as against the complainants.

That the construction company has parted with its title I have little doubt. Whatever may be said as to the legal effect of the instrument signed by Mr. Ashley, it is clear that the construction company abandoned the property and the railway company took possession. The construction company held the title subject
93 to speedy forfeiture, and, while there is dispute in the testimony as to whether there was ever the formality of a surrender, it is evident that all parties in interest understood that it had practically abandoned the property. It in fact received a consideration, the nature and value of which will be considered hereafter, and with its knowledge the railway company and the trustees entered into a new contract involving expenditures by the railway company, and with like knowledge the railway company proceeded to complete the railroad. Under these circumstances it would be ignoring the substance of things to hold that the title still remained in the construction company. But the difficult question is the other, and in respect to this I notice, first, that there are no especial equities in complainants' claim, either against the construction company or upon this property. Not a single rail was ever received by the company or placed upon the road-bed. In other words, the property

was in no manner improved and the company never received anything. While the complainants' claim is undoubtedly a just debt, it is only a naked, barren legal obligation, unattended with any equities as against the company or the property.

Secondly. There is nothing in the conduct of either the construction or railroad company which indicates bad faith or an effort to avoid just liabilities. The construction company had about seventy-five thousand dollars, two-thirds of which went to complainants, the company receiving nothing therefor; nineteen thousand dollars of it to the trustees for the purchase of the property, and the balance was expended in surveys and kindred matters. Finding itself unable to complete its undertaking, it practically abandoned the work; and the contract in pursuance of which the railroad company
94 paid out money and assumed liability was executed nine months before; by the commencement of suit notice was given of any intention on the part of the complainants to make further claim against the construction company.

Thirdly. There was a consideration; it appears that the construction company received one hundred thousand dollars in income bonds of the railway company. It is contended that there were worthless, and doubtless their only value was speculative, but what was the value of that which the construction company parted with? It would be grossly unfair to estimate its value by the money expended on the road-bed and masonry. Even when a railroad is completed and in operation the cost is a very uncertain test of value. The amount of business which the road does, the earnings which it makes, are far more certain tests of value than the cost of construction. As the cost is a poor test of value in a completed road, much more is it so in reference to the disconnected fragments of an incomplete road; and this when the owner has a perfect and indefeasible title. And here it must be borne in mind that the road-bed had been lying for over four years uncared for and subject to all the waste and deterioration which comes from rains and the changes of the seasons. But beyond all this the construction company had no indefeasible title. It had done no work during its possession, or practically none, and its title was subject to a speedy forfeiture. It was almost an impossibility for it in the time left to have performed the conditions necessary to prevent a forfeiture, so that practically it held title subject to the pleasure of the trustees, its vendors. Under these circumstances what was the value of its interest? Certainly most trifling, and, although from the testimony I cannot find that there was ever any formal
95 surrender to the trustees, it is obvious that the parties treated the matter as though the forfeiture had been made, as though the construction company had abandoned the work and the way was opened for a new arrangement between the railway company and the trustees. The value of the income bonds may have been and was purely problematical and speculative, but was that value any less than that of the interest of the construction company in the property. It is very difficult to believe that it was. Looking at all the circumstances surrounding these transactions, it seems to me that

it would be grossly inequitable to permit the complainants to treat this property as then the absolute and indefeasible property of the construction company and to charge it with their claim as having been sold and conveyed in fraud of their rights. The complainants may have lost some portion of the profits expected from their contract, but the construction company lost all that it had, and the railway company, while it received something, got no more than it might have easily obtained from the trustees directly after a forfeiture had been formally declared. Indeed, as I have before said, the parties seemed to have acted as if the forfeiture had already been declared and the interest of the construction company had ceased.

The first stipulation in the contract between the railway company and the trustees recited that the conditions in the deed from the trustees to Brooks are annulled, rescinded, and extinguished, and in lieu thereof the conditions following are provided, implying plainly that there was a new transaction between new parties in lieu of that which had proved practically a failure.

For these reasons I think that the defendants are entitled to a decree dismissing the bill and this without reference to
96 the technical questions presented as to the effect of the attachments placed upon the road-bed and masonry.

The bill will be dismissed at complainants' costs.

And on the 7th day of October, A. D. 1889, and at the regular September term of said court the following entry was made of record:

B. SCHLESINGER *et. al.*
against
K. C. & S. R'Y Co. *et. al.* } 401.

The following decree was this day filed and ordered to be recorded:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *set:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, September Term, A. D. 1889.

MONDAY, *October 7th.*

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners Doing Business under the Firm Name and Style of Naylor & Co., Complainants,

against

KANSAS CITY & SOUTHERN RAILWAY COMPANY, THE KANSAS City & Southern Construction Company, The Farmers' Loan and Trust Company, and James I. Brooks, Defendants.

Final Decree.

This cause having been heretofore submitted to the court, George W. McCrary and Jefferson Brumback appearing for the com-

97 plainants and C. O. Tichenor and Robinson, O'Grady & Harkless for the defendants, it is now ordered, adjudged, and decreed that the bill of the said complainants be dismissed for want of equity, and that the said defendants recover of said complainants their costs herein. Thereupon complainants pray an appeal herein, which is accordingly granted, and the bond therefor fixed at five hundred dollars, to be approved by one of the judges of this court.

(Signed) DAVID J. BREWER,
Circuit Judge.

On the trial of said cause the following proofs were adduced on the part of the complainant- and the defendant-, to wit:

98 In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

BERTHOLD SCHLESINGER *et al.*, Complainants,
vs.
KANSAS CITY & SOUTHERN RAILWAY. } No. 401.

Abstract of Pleadings.

The amended and supplemental bill, after setting forth the citizenship of the parties, avers that the defendant, The Kansas City & Southern Construction Company, was on the 24th day of May, 1880, the owner of the property in controversy, to wit, certain property situate in the counties of Jackson, Cass, Henry, and St. Clair and other counties in the State of Missouri, known as the Kansas City, Memphis & Mobile railroad, running from Kansas City, in Jackson county aforesaid, in the direction of the city of Memphis, in the State of Tennessee, together with all and singular the rights of way, road-bed, masonry, property, rights of property, and appurtenances, as also the franchise and right to construct, maintain, and operate upon and along said railroad and right of way a railroad.

That on the 2nd day of March, 1880, complainants, under their firm name of Naylor & Company, entered into an agreement with the said defendant construction company to furnish and supply to said construction company, and the said construction company became bound to receive, five thousand tons of English and German steel rails, as nearly as may be, twelve hundred and fifty tons monthly, beginning April, 1880, at the price of $51 in bond per ton delivered in the city of New York, for the construction and equipment of said railroad by said construction company and on the terms and conditions contained in the contract.

The bill proceeds to set out the performance of said con-
99 tract on the part of the complainants, giving all necessary details and the failure on the part of the construction Co. to comply with its part of said contract and the resulting damage to the complainants.

It further sets forth that on the 7th day of October, 1881, complainants commenced an action under their firm name against the

defendant construction Co. in the circuit court of Jackson county, Missouri, to recover the damage resulting from the violation of the above-named contract on the part of said construction Co.; that on the 7th day of October, 1881, an original writ of attachment and summons duly issued in said action, commanding the sheriff to attach the lands, tenements, goods, chattels, rights, moneys, and effects of said defendant construction Co., and on the same day separate writs of attachment were issued to the counties of Cass, Henry, and St. Clair, in the State of Missouri, through which said railroad is located as aforesaid. The due levy of said writs of attachment by the sheriffs of the several counties upon the property above mentioned is set forth in the bill, said levies having been made on the 7th, 11th, and 12th days of October, 1881. It is further averred that the property levied upon was all the property of whatsoever kind held or owned by the said defendant construction Co. at the times of the execution of said contract by it with complainants and of the accruing to complainants of the claim and liability against said defendant construction Co., as in the bill mentioned.

That the defendant railway company was incorporated June 10, 1880, under the general laws of Missouri.

That on the 12th day of May, 1880, the defendant construction Co. executed and on the 24th day of May, 1880, its secretary, and May 31, 1880, its president, acknowledged a deed of conveyance which in terms purports to be made to the Kansas City & Southern Railroad Co., purporting to convey the property above mentioned for the expressed consideration of $300,000 of the capital stock of said railroad company to be issued to said construction Co., and $300,000 of first-mortgage bonds to be issued and paid by such railroad company to said construction Co., and that said deed was afterwards placed of record.

That on the 23rd day of July, 1884, there was filed for record in the recorder's office of St. Clair county, and on July 30, 1884, in the recorder's office of Jackson county, an instrument in writing, dated September 18, 1880, whereby the said construction Co., for the recited consideration of $250,000, quitclaimed to the defendant railway company the property so attached as above stated. Complainants are unable to state when the last-mentioned instrument was delivered; that the deed of May 24, 1880, was intended to be made and delivered to a railroad corporation thereafter to be created by several individuals, to bear the name of the Kansas City & Southern Railroad Company, but that no corporation of that name was ever formed, but that some of the parties who contemplated forming such corporation and, perhaps, others formed as above stated said Kansas City & Southern Railway Company, and therefore said last-named corporation got possession of said deed and caused the same to be recorded.

That the said railroad company has since 1880 claimed and now claims to own all of said property so attached under one or both of said deeds. Copies of both of said deeds are set forth.

That the defendant railway Co. has never issued to the defendant construction Co. any certificate for capital stock whatever.

That the defendant railway Co. has never issued, delivered, or paid to said defendant construction Co. any first-mortgage bonds or bonds of any kind, and that defendant railway company has
101 never paid to defendant construction Co. the $250,000 of money recited as paid in said deed of September 18, 1880, nor any part thereof, and that the consideration recited in each of said deeds remains wholly unpaid; that the consideration recited in each of said deeds is wholly colorable, and that each of said deeds was made without any consideration whatever, and each deed is and was a voluntary conveyance of said defendant construction company, not upheld by any consideration, and that said defendant railway company now claims the title to said property purported to be passed by each of said deeds without having paid any consideration whatever therefor, and that the property which each of said deeds purports to convey is the same property owned by said Kansas City & Southern Construction Co. at the date of your orator's said contract and at the date of the incurring of the liability to your orator and of the accruing of said claim upon which said attachment suit was brought in the circuit court of Jackson county, Missouri, and is the same property from Kansas City to the southern and eastern limits of said St. Clair county upon which the writs of attachment in said suit have been levied.

That at the time of entering into the contract aforesaid and of the creation of the liability of the defendant construction Co. to complainants thereunder and of the accruing of the claim, demand, and charge of complainants herein alleged the said property was all of the property and property rights owned and held by the said defendant construction Co., and that said defendant construction Co. had not at said times nor has it now any other property of any kind nor any property rights out of which the said claim against it could or can be satisfied or paid in whole or in part; that said construction Co. was at said times and is now wholly insolvent and unable to pay or satisfy complainants otherwise than out of said property and property rights aforesaid.

102 That said property and property rights of defendant construction Co. became and were bound in equity for the payment of complainants' claim and indebtedness and were and are a trust fund for the satisfaction and discharge of the same, and that the Kansas City and Southern Railway Co. received said deeds purporting to convey to it said property and property rights with full knowledge on the part of the officers managing and controlling said defendant railway company at the time of said purchase of the existence of said liability and indebtedness, and said railway company became bound in equity and good conscience to pay off and fully satisfy and discharge the same.

That since the levy of said attachments said railway Co. has executed and delivered a deed of trust to the Farmers' Loan & Trust Co. to secure certain first-mortgage bonds, but that the lien of said Farmers' Loan & Trust Co., if any, is subsequent and subject to the claim of complainants under their attachments aforesaid.

That on May 11, 1881, the said construction Co. conveyed the

property in question to James I. Brooks in trust to secure certain indebtedness alleged to have been due to said Brooks, and also to secure the payment of any debts contracted by said construction company prior to the date of the conveyance of May 11, 1881, and any balance to be held for the benefit of whom it may concern.

That such proceedings — had in the attachment suit above mentioned that the cause was removed to the circuit court of the United States for the western district of Missouri, and was pending there at the time the original bill was filed.

By supplemental bill it is shown that upon final hearing judgment was rendered in favor of complainants and against the construction company on the first day of February, 1886, for the sum of $35,901.39 and costs, and that the attachment be
103 sustained and the judgment hold not only the property attached heretofore in the cause, but the other property of the defendant; but it was provided that execution should not issue without special leave of court until after decree in the present suit.

The prayer is that the deeds purporting to convey said property to the construction company set out in the bill be set aside and be adjudged voluntary, fraudulent, and void as against the debts, claims, liabilities, and demands of complainants as set forth in the bill, and that the property in controversy be subjected to and charged with the claim, demand, debts, and liabilities of the complainants aforesaid to the full extent thereof, together with interest and costs of said attachment proceedings and of this suit, and that said property be sold by the order and decree of this honorable court to satisfy, pay off, and discharge the same, and that in the meantime a receiver be appointed, and for general relief.

Answer of Defendant K. C. & Southern Railway Co.

The answer avers that it is not true that at the times mentioned in the bill or at any other time the defendant The Kansas City & Southern Construction Co. was seized or possessed under its corporate name or otherwise of the said Kansas City, Memphis and Mobile railroad or any part or portion thereof or interest in the right of way, road-bed, masonry, property or rights of property, or any appurtenances belonging to or in anywise appertaining to said
104 railroad, or any right and franchise to construct, maintain, or operate along said railroad or right of way *of* railroad, and it avers that at any of the times mentioned in said bill of complaint or at any time said Kansas City, Memphis & Mobile Railroad Company had no property whatever save as in the answer set forth and described.

It further avers that the construction Co. was a corporation organized under the laws of Connecticut concerning "joint stock companies;" that it filed its articles of association setting forth that it was organized for the purpose of purchasing and selling railroad stocks, railroad bonds, and other securities and to make advances in money to railroad and other improvement, mining, and manufacturing companies and to enter into contracts for the construction of rail-

roads and all kinds of public works, and also to aid contractors, miners, and manufacturers, and to endorse and guarantee the payment of the bonds and the performance of the obligations of individuals, companies, and corporation-, and to buy, sell, and deal in any real or personal property necessary or convenient in the prosecution of said business, and to do all things incidental to said business and its management and for no other purpose whatever, and had no right, authority, or franchise to engage in or carry on any business involving or concerning buying and selling real estate, or any other business matter or transaction whatsoever, or to acquire or hold any property, real, personal, or mixed, or any right, interest, or franchises save such as might be necessary for the transaction of said business aforesaid as it was organized in accordance with the laws of the State of Connecticut.

It denies that the construction Co. had power to acquire real estate outside of the State of Connecticut save such as might be necessary for the carrying on of any such business in the State
104½ where such real estate might be situated as it (the construction Co.) might then be carrying on lawfully in said State of Connecticut; and the answer avers that the construction company did not at any time prior to the institution of this suit carry on in the State of Connecticut any of the aforesaid kinds of business which, by its charter aforesaid, it was authorized to carry on, only keeping an office and books and papers and clerks and employés to attent to said office, books, and papers.

That the said Kansas City, Memphis & Mobile Railroad Company was a corporation organized under the laws of the State of Missouri, and the purpose of its organization is set forth.

It is further averred that the alleged ownership of the construction Co. set forth in the bill of the Kansas City, Memphis & Mobile Railroad Company, together with all and singular the rights of way, road-bed, masonry, property, and rights of property and appurtenances whatever and wheresoever situated belonging to or in anywise appertaining to said railroad, as also the right and franchise to construct, maintain, and operate upon and along said railroad and right of way a railroad, is solely and only based upon and asserted to exist by virtue and reason and because of the following pretended facts and transactions, and not otherwise, and not because of any other facts, true or pretended acts, or matters alleged by the complainants.

It is then set forth that the Kansas City, Memphis & Mobile Railroad Co. was duly adjudged bankrupt; that its property became vested in assignees; that a sale was ordered and was duly made, said property being sold to John D. Bancroft. Then follows the following allegation: "And said Kansas City & Southern Railway Company now claims said property and franchises thereof through means of conveyances from said Bancroft outside of and independent of any conveyance or pretended conveyance of said
105 Kansas City & Southern Construction Company to said Kansas City & Southern Railway Co."

As to the contract between the construction Co. and complain-

ants and as to the violation of the same by the construction Co. and the consequent damage to the complainants the defendant denies all knowledge or information sufficient to form a belief or opinion and demands proof; but it is averred that it is not true that there was or is such a company or corporation as the Kansas City & Southern Railroad Company, or that there is any such named person or corporation, or that any such named person or corporation is a defendant to this suit, either actually of record or by privity, or that any such person or corporation was grantee or beneficiary in any conveyance whatsoever.

It admits the commencement of the attachment suit and the issuance of the writs to the several sheriffs, as stated in the bill, but denies that said sheriffs of any of them duly executed all or any of said writs of attachment or levied said writs on any property whatever, because said Kansas City, Memphis & Mobile R. R. Co had no property save a right of way for its railroad and certain easements and franchises held and enjoyed by it as and for the purpose of constructing, maintaining, and operating a railroad under the laws of the State of Missouri, and the only property which said writs of attachment or any of them was claimed to have been levied upon by said sheriffs or any of them consi-ted only of the right of way, easements, and franchises, and defendant denies that the right of way, easement, or franchises or any of them is subject to levy on or under any writ of attachment, and avers that the levies are void and of no effect, and denies that the property levied on consi-ted of masonry or of any property, rights of property, road-bed, or appurtenances or franchises other than the right of way, easements, and fran-
106 chises of said Kansas City, Memphis & Mobile Railroad Co. Then follows the following allegation:

"And it denies that said defendant construction Co. ever held or owned any of said property last mentioned by any valid title or claim or at all or at the time of the execution of said pretended contract with complainants or of the accruing to complainants of any pretended claim or liability against said defendant construction Co."

Concerning the deed of September 18, 1880, to the Kansas City & Southern Railroad Company defendant avers that it has no knowledge or information sufficient to form an opinion as to whether it was as stated in the bill or not, but defendant says it is not true that it has since 1880 claimed or now claims any or all of said property so claimed to have been attached under both of said deeds. Defendant denies that it got possession of the deed of May 24, 1880, and caused the same to be recorded.

Admits that it never issued any certificate for stock to the Kansas City & Southern Construction Co. nor paid to it said sum of $250,000 mentioned in the bill of complaint, but it avers that it never received any consideration for the delivery of said stock or the payment of any such sum of money; that the construction Co. pretended to the defendant to be the owner of certain rights of way and property and to be authorized to convey the same to this defendant and did agree and promise to convey the same, and in consequence

of such agreement and representations did obtain from this defendant $100,000 of its income bonds, which were the only bonds ever promised by this defendant to the said defendant construction Co.; that the said construction Co., in order to render the income bonds of any value, released the defendant railway Co. from
107 any obligation to issue said stock.

Denies that either of the deeds mentioned in the bill as having been executed by the construction Co. was without consideration or was or is a voluntary conveyance of said construction Co. and not upheld by any consideration; denies that this defendant claims title to any property purporting to be passed by each of said deeds without having paid any consideration therefor. Defendant admits that said deeds assume to convey, among other property, the property owned by this defendant, but this defendant does not derive its title to its said property under said deeds.

Denies that the property attached was all the property and rights owned or held by the construction Co. and avers that said last-mentioned property never was held or owned by said defendant construction Co., and that it was incapable of holding or owning the same; admits that the construction Co. has no property in Missouri or elsewhere as this defendant knows of, but whether or not the said construction Co. or its legal representatives has any other property or stock subscriptions out of which complainants could make their claim, if they have any, defendant has no knowledge sufficient to form an opinion.

Denies that the property in question became and was bound for the payment of the claim of complainants or was or is a trust fund, as alleged, for satisfaction or discharge of the same, or that the defendant received the deeds with full knowledge of said alleged or any indebtedness of said construction Co. to complainants.

Defendant denies that the defendant railway Co. is in equity or good conscience bound to pay off or fully or partially satisfy the same claim of complainants.

The answer further avers that—

108 "This defendant says that it is true that it refused to pay off said alleged claim and that it claims said property in fee simple and free of any claim of complainants against it or said construction company; that this defendant has executed to the Farmers' Loan & Trust Co. a deed of trust to secure bonds as stated in said bill of complaint, and that said deed bears date and was recorded as stated in said petition, and that said Farmers' Loan and Trust Company claims a lien on said property under said deed," but this defendant denies that the lien of the trust Co. is junior to that acquired under the attachment.

Admits that the defendant is in possession of the property.

Denies the conveyance to James I. Brooks, as trustee, as set out in the bill.

Admits the removal of the attachment suit to this court.

Answer of James I. Brooks.

The answer of James I. Brooks is a substantial admission of the principal allegations of the bill.

Answer of Def't Farmers' Loan & Trust Co.

The answer of defendant Farmers' Loan & Trust Company puts in issue the allegations of the bill in so far as they relate to the deeds of trust executed to said defendant.

The defendant The Kansas City & Southern Construction Co. is in default.

This defendant was a party to the original action in attachment and appeared in that case by John O'Grady, its attorney, and service in the present suit was made upon said construction Co. by service upon said attorney by order of the court.

J. BRUMBACK &
GEO. W. McCRARY,
For Comp's.

109 In the United States Circuit Court for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER *et al.*, Plaintiffs,
vs.
KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

Abstract of Complainants' Proofs.

Documentary evidence.

First. Certified copy of articles of association of the Kansas City, Memphis and Mobile Railroad Company.

These articles show that the corporation was organized under the laws of Missouri on the 19th day of August, 1871, for the purpose of surveying, marking, locating, constructing and maintaining, using, and operating a railroad from some point on the railroad of the Atlantic & Pacific Railroad Company between ranges seventeen and twenty-two west of the fifth principal meridian in the State of Missouri, being the point on said Atlantic & Pacific railroad to which the Clinton & Memphis branch of the Tebo & Neosho railroad shall be finally located and established, through the counties of Greene, Webster, Wright, Texas, Howell, Ozark, Douglas, Taney, & Christian, in the State of Missouri, or some of said counties, and into and through such of said counties as upon a minute survey shall be found to afford the most practicable and advantageous route for the railroad of said company from the said point of beginning to the south line of the State of Missouri in the general direction of the city of Memphis, in the State of Tennessee, and to extend, construct, maintain, and operate said railroad across the

State of Arkansas to a point on the Mississippi river opposite Memphis, and also to construct, maintain, and operate a railroad from some point on the main line of the railroad aforesaid in the State of Arkansas to Helena, in the State of Arkansas, in the gen-
110 eral direction of Mobile, in the State — Alabama, and also for the purpose of acquiring, constructing, maintaining, and operating such connecting lines of railroad and branch railroads as may be convenient, necessary, and useful to the traffic and business of said company, and the said company may by law be authorized to acquire, construct, maintain, and operate, and also for the purpose of consolidating with, leasing, purchasing, and appropriating such connecting lines of railroad as by law the said company may at any time be authorized to consolidate with, lease, purchase, and appropriate for the purpose of possessing and exercising all rights, franchises, powers, and privileges which they may now or at any time hereafter possess and exercise.

2nd. Certified copy of resolution of the board of directors of the Kansas City, Memphis & Mobile Railroad Company to extend its line.

This resolution is as follows:

"Resolved, That the line of railroad of this company be, and the same is hereby, extended from its northern terminus at the Atlantic & Pacific railroad in a general northwesterly direction to Kansas City, in Jackson county, in the State of Missouri."

The resolution was accepted at a meeting of the board of directors held on the 31st day of August, 1871, and the certificate shows that more than two-thirds of the board of directors were present and that the resolution was unanimously adopted.

3rd. Certificate of the Clinton & Kansas City branch of the Tebo & Neosho Railroad Company showing sale and conveyance of the Clinton & Kansas City branch of the Tebo & Neosho Railroad Company to the Kansas City, Memphis & Mobile Railroad Company.

This certificate shows that on the 31st day of August, 1871,
111 the Tebo & Neosho Railroad Company, by and through its duly authorized committee and by the direction and authority of the holders of all the capital stock subscribed to said company, did sell, assign, and convey the said Clinton & Kansas City branch of the Tebo & Neosho railroad, together with all and singular its property, real and personal, choses in action, rights, powers, and franchises, unto the Kansas City, Memphis & Mobile Railroad Company, and that a majority of the holders of the capital stock of said Tebo & Neosho railroad subscribed in the name of said branch railroad did on the day aforesaid assent to and vote in favor of making such sale, assignment, and conveyance, and did thereafter assent thereto in writing, and did thereafter in writing approve and ratify said sale, assignment, and conveyance.

4th. Certified copy of certificate of the Kansas City, Memphis & Mobile Railroad Company in the matter of the purchase of the Clinton and Memphis branch of the Tebo & Neosho railroad and the Clinton and Kansas City branch of the Tebo & Neosho Railroad Company.

This is a certificate signed by Dewitt C. Stone, president of the Kansas City, Memphis & Mobile Railroad Company, and William O. Mead, secretary of the same, filed November 16, 1871, and shows that the Kansas City, Memphis & Mobile Railroad Company did on the 31st day of August, 1871, purchase the Clinton and Memphis branch of the Tebo & Neosho railroad, and that all the stockholders of the said Kansas City, Memphis & Mobile railroad, being convened in person or represented by proxy in the town of Clinton, Henry county, Missouri, on the day aforesaid, did sign a written consent on
112 the record of said meeting to the transaction of the business proposed thereat, and that afterwards, on the day aforesaid, all the holders of the stock of said company in person or by proxy did assent to said purchase and ratify and approve the same, and that afterward, on the 1st day of September, 1871, a majority of the stockholders of said company did assent to the purchase of said branch railroad in writing; that said written assent is entered upon the records of said company; also that on the same date the Kansas City, Memphis & Mobile Railroad Company did purchase the Clinton & Kansas City branch of the Tebo & Neosho railroad, to which purchase all the stockholders of the Kansas City, Memphis & Mobile Railroad Company have assented in writing; that said assent is entered upon the records of said company, and that the holders of a majority of the stock in such branch railroads have assented in writing to the sale of said branch roads and each of them to the Kansas City, Memphis & Mobile Railroad Company.

4½. Certificate of the Clinton and Memphis branch of the Tebo & Neosho Railroad Company in the matter of the sale and conveyance of said branch to the Kansas City, Memphis & Mobile Railroad Company by the Tebo & Neosho Railroad Company. Filed November 16, 1871.

5th. Certified copy of the order of the district court of the United States in and for the central division of the western district of Missouri adjudicating said Kansas City, Memphis & Mobile railroad a bankrupt.

This is in the usual form of adjudications in bankruptcy.

113 6th. Certified copy of record of same court showing the election of assignees in bankruptcy of said company.

7th. Certified copy of order of same court showing approval of said election of assignees and appointing an additional assignee by the court.

8th. Certified copy of deed of assignment of said bankrupt's estate in the usual form.

9th. Certified copy of petition of the assignee of said bankrupt for an order for the sale of the roadway, etc., of said bankrupt.

10th. Certified copy of the order of said court directing such sale.

11th. Certified copy of report of said assignees showing sale of said roadway, etc.

12th. Certified copy of the order of said court approving said sale.

By these several orders authority was given to the assignees to sell "the road-bed, masonry, and right of way of said Kansas City, Memphis & Mobile railroad, with the appurtenances," and this was the property advertised and sold, the sale being duly approved by the court, the purchaser being John D. Bancroft, of Kansas City, the price paid being $15,025.

13th. Certified copy of deed from the assignee of said bankrupt's estate to the purchaser, said John D. Bancroft, conveying said road-bed, masonry, right of way, and appurtenances.

114 14th. Certified copy of deed from John D. Bancroft to Thomas K. Hanna, Benjamin McLean, and John D. Bancroft, trustees, conveying the same property.

15th. Certified copy of deed from Thomas K. Hanna, Benjamin McLean, and John D. Bancroft, trustees, to James I. Brooks.

This deed is upon the condition that the said Brooks shall build said railroad from Kansas City to Harrisonville, or Belton, as he may elect, on or before the first day of January, 1881 so as to be ready for use as a railroad, and also to build said railroad to the coal fields of Bates county to a point south of Butler, on or before July 1st, 1881, so as to be ready for like use as aforesaid; and it was provided that if said Brooks should fail to build said railroad to said coal fields as aforesaid, then the property conveyed should revert to the grantors and reinvest in them: Provided, however, that as soon as said Brooks should expend the sum of fifty thousand dollars in the construction of a road-bed for said railroad, commencing at Kansas City and running southward, the provision of the reversion of the property as aforesaid should become null and void and of no effect whatever; and, further, that upon the expenditure of said sum of fifty thousand dollars by said Brooks, the grantors were to execute to him or his assigns an instrument, in writing, acknowledging the waiver and extinguishment of said forfeiture. The deed also provided for arbitration in case of failure to agree as to the expenditure of said sum of fifty thousand dollars.

16th. Declaration of trust by James I. Brooks to the Kansas City & Southern Construction Company.

115 This instrument is acknowledged the 27th of February, 1880, and declares that the purchase by Brooks was made

for the benefit of a company to be formed by the stockholders of the Kansas City & Southern Construction Company, and he therefore declares and makes known, the company having been legally organized, that the property was conveyed to him for the purp-ses above named, and was hold and will continue to be held by him in trust for the benefit of the Kansas City & Southern Construction Company.

17th. Deed of conveyance from James I. Brooks to Kansas City & Southern Construction Company.

This deed conveys "The Kansas City, Memphis & Mobile railroad, running from Kansas City, Jackson county, Missouri, in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, through the States of Missouri and Arkansas, together with all and singular the rights of way, road-bed, masonry, property, rights of property and appurtenances whatsoever and wheresoever situated of and belonging or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis & Mobile Railroad Company."

18th. Certified copy of resolution of the board of directors of the Kansas City & Southern Railway Company extending the line of its road from Osceola, St. Clair county, Missouri, to the State line, in Howell county, dated April 11, 1882.

This reads as follows: "Resolved, That the line of railroad of this company be, and the same is hereby, extended from the town of Osceola, Missouri, its present terminus, through the counties of St. Clair, Polk, Greene, Webster, Wright, Douglas, Ozark, and Howell, in the State of Missouri, in a general southeasterly direc-
116 tion, as the same may be hereafter marked, located, and surveyed, to such point in the said county of Howell and on the State line between the States of Missouri and Arkansas as will connect the terminus of the road of this company with the northern terminus of the road of the Iron Mountain & Helena Railroad Company."

19. Copies of two deeds purporting to have been executed by the Kansas City & Southern Construction Company, one to the Kansas City & Southern Railroad Company and the other to the Kansas City & Southern Railway Company, both copied in bill and admitted in answer.

The latter of these deeds, executed to The Kansas City & Southern Railway Company, the defendant in this suit, was dated on the 18th day of September, 1880, and filed for record 18—, and describes the property conveyed as follows:

"The Kansas City, Memphis & Mobile railroad, running from Kansas City, Jackson county, in the State of Missouri, in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, through the States of Missouri and Arkansas, together with all and singular the rights of way, road-bed, masonry,

property, rights of property, and appurtenances whatsoever and wheresoever situated of and belonging or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis & Mobile Railroad Company, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainder or remainders, rents, issues, and profits thereof."

The said deed also contains the usual covenants of warranty.

117 20th. The original papers and files, including all record entries, in the case of Berthold Schlesinger and Sebastian D. Schlesinger *vs.* Kansas City & Southern Construction Company, in this court.

This was a suit by attachment upon contract entered into between the plaintiffs and defendant, upon which a writ of attachment was duly issued and levied upon "all the right, title, and interest of the defendant, The Kansas City & Southern Construction Company, of, in, and to the following-described property, to wit: "The Kansas City, Memphis & Mobile railroad, running from Kansas City, Jackson county, in the State of Missouri, in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, through the States of Missouri and Arkansas, together with all and singular the rights of way, road-bed, masonry, property, and rights of property and appurtenances whatsoever and wheresoever situated of and belonging or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company, being the same property conveyed by the Kansas City & Southern Construction Company to the Kansas City & Southern Railroad Company by deed dated the 24th day of May, 1880, and recorded in the recorder's office within and for the county of Jackson, in the State of Missouri, in Book B # 45, page- 606 and 607."

In this suit, as those records will show, a trial was had and judgment was eventually rendered in favor of plaintiffs and against the said defendant for the sum of $35,901.39, and attachment was sustained and an order entered for the sale of the said attached property. The bill in the present case is brought to enforce said judgment and order as against the defendant herein, The Kansas City & Southern Railway Company, the purchaser and present
118 holder of the attached property.

21st. Abstract of attachment in the cause last above named, showing levy upon property in Jackson county.

22nd. Abstract of attachment in same case, showing levy upon property in Cass county.

23rd. Abstract of attachment in same case, showing levy of attachment upon property in Henry county.

24th. Abstract of attachment in same case, showing levy of writ of attachment upon property in St. Clair county.

25th. Certified copy of statute of Connecticut respecting proof of due formation of a corporation in said State.

26th. Certified copy of resolution of the board of directors of the Kansas City & Southern Railway Company extending the line of its road from Clinton, Henry county, to Osceola, St. Clair county. Filed December 28, 1880.

27th. Certified copy of certificate of organization of the Kansas City & Southern Construction Company.

The purposes for which this corporation was organized are stated as follows:

"To purchase and sell railroad stocks, railroad bonds, and other securities, and to make advances in money and credit to railroad and other improvement, mining, and manufacturing companies, and to enter into contract for the construction of railroads and of all kinds of public works, and also to aid contractors, miners, and manufacturers, and to endorse and guarantee the payment of the bonds and the performance of the obligations of individuals, companies, and corporations, and to buy, sell, own, and deal in any real
119 or personal property necessary or convenient for the prosecution of said business, and generally to do all things incidental to said business and to the proper management thereof.

28th. Complainant's depositions.

WILLIAM D. BURKE, being sworn and examined, says:

Age, 31 years; resident of Clinton, Henry county, Missouri; civil engineer by occupation; been civil engineer 10 years. It is a part of my duties as engineer to estimate the measurements of stone-work, excavations, and embankments of railroads. I know the road-bed generally known as the "Kansas City & Southern," at present and formerly known as the "Kansas City, Mobile & Memphis railroad," consisting of road-bed, bridges, culverts, trestle-work, grades, fills, and cuts from Clinton, Henry county, Missouri, to Osceola, in St. Clair county, Missouri. I have known it for three years. I measured all the stone-work and timber in the trestle-work and cattle-guards between Clinton and Osceola on said railroad, commencing on the 21st day of February and ending on the 25th day of the same month in 1888, and from such measurements I have ascertained that there is 2,573.4 yards, approximately, of bridge masonry, worth, approximately, $10.50 per cubic yard, and 2,563.7 cubic yards, approximately, of culvert masonry, worth, approximately, $5.50 per cubic yard, and 76,822 feet, board measure, timber in trestles and cattle-guards, worth, approximately, $35 per 1,000 feet. The total value, according to the above estimate, is $43,809.82. I should say that the piers and culverts showed that they were built more than three years ago; not less than five years ago, and some looked as though they had been built 25 years ago.

120 Cross-examination:

I do not know when the bridges and cattle-guards and trestle-work were built and constructed. From appearances the Grand

River bridge is comparatively new—not more than three or four years old—but the trestles and cattle-guards look as though they might have been built for eight of ten years. I first went over the line in the fore part of 1885; never saw it until then. Judge Gant, on behalf of the plaintiffs, employed me to make the measurements to which I have testified. I do not know what improvements were on the line of the Kansas City & Southern railroad at the time the Kansas City & Southern Railway Company took possession.

Redirect:

When I spoke of the Grand River bridge being comparatively new I referred to the superstructure and not the piers. The piers seemed to have been built some years.

FRANK S. WARE, being produced, sworn, and examined, deposes:

Am 44 years old and a resident of Clinton, Henry county, Missouri; am collector of revenue of Henry county, Missouri. The railroad from Clinton, in Henry county, Missouri, to Osceola, in St. Clair county, Missouri, at present known as the "Kansas City & Southern railroad," was first constructed in October, 1871. All the mason-work between Clinton and Osceola was built at that time. Frank McCabe had the contract to do the stone-work between Clinton and Osceola, and did the work. He lived at Sedalia at that time. I was book-keeper and paymaster for him. J. B. Colt, of Clinton, Missouri, had the contract for doing the grading. When
I spoke of the masonry being completed between Clinton and
121 Osceola I included the piers of the Grand River bridge. I think Mr. Colt completed the grading of the said railroad about the same time the bridge masonry and culvert-work was completed. I have resided most of the time since 1871 in Clinton, Henry county, Missouri, and am familiar with said railroad.

At the time the Kansas City & Southern railway took charge of the line of railroad the second-class masonry was there except one pier at Galliniper, which pier had washed away.

WILLIAM MILLER testified:

Am a resident of Kansas City, Missouri, and am civil engineer by occupation; have been engaged in that business for 40-odd years; was employed in 1871 by the Kansas City, Memphis & Mobile Railroad Company as engineer in revising the location—in making a part of a location and revising the balance—from here to Clinton, in Henry county, Missouri. The route, generally speaking, over which that company commenced the construction of a railroad was from Kansas City through Westport, west of Hickman's Mills, and by Belton, following a graded road for three or four miles eastward to Harrisonville, passing west of the post office called "Peculiar" to Harrisonville. The further point or terminus was Clinton. There were several small towns that we passed on the way there. After completing the location I was employed in the office in fixing up

drawings and papers of one kind or another connected with the road and the right of way, etc. I know of the work while it was in progress from being connected with the company for several months and from being a citizen here, and since then, by request of this firm of Pratt, McCrary & Ferry, I have gone over the ground and made a rough estimate of quantities. I have estimates and
122 details taken roughly. I have my memoranda in detail in a small book here in which I took notes while I was engaged on this work, and the notes are very full; the book is entirely filled with them. The first paper here is a memorandum of instructions or memoranda; there are several of them; then follows a letter and afterwards comes a report containing the consolidation of those estimates or a condensed statement of those estimates.

Question. "Now, having referred to that paper which you have in your hand for the purpose of refreshing your memory, please answer my question as I first put it, which is as follows: State approximately the present condition and give a rough estimate of the present value of the old grade of the Kansas City, Memphis & Mobile Railroad Co. from Kansas City southward to Osceola."

Answer. "I have stated here that the work was done 15 years ago. The estimate includes $20,000 for right of way through Jackson county, and $123,880 was estimated as being the present value of the work in its present condition, as it now stands or as it stood before any further improvements were made upon it recently."

That is in Jackson county alone, and then $55,820 in Cass county at the time it was taken possession of by the Kansas City, and then $125,000 and $15,000 for right of way in Henry and St. Clair counties.

The value of the old grade would be about $140,000 through Henry and St. Clair counties. The total value of the whole roadbed over the whole line from Kansas City to Osceola would be $319,700. In making my estimate I passed over the line. A large portion of the way there were center stakes set and the stakes
123 were numbered and I looked at them, and they would, for instance, commence at nothing here and there would be ten feet of a cut in the center and probably at the other end it shelved off in the same way to nothing, and I roughly estimated the average depth of the cut and the average width as near as I could get to it, taking the bottom width, and in some cases a slope of 1 to 1 and in some places a slope of 1½ to 1, making liberal allowance for wash and deterioration. The masonry was badly damaged in some places The part in Jackson county was in better preservation; more especially at this end of the road it was in better preservation than at the further end. In Cass county the condition in places was very bad indeed. The foundation had been defective and the storms had damaged it and washed it out; washed under the masonry in a number of places. Even the stones were washed out.

The Kansas City & Southern Railway Co., defendant, is now in possession of that portion of the road from Clinton to Osceola, about 26 miles. It seemed to have been about December 14, 1882, that

work was commenced at Clinton, and three miles of the road were in operation on June 11, 1883.

I have no means of knowing how much the Kansas City & Southern Railway Company has added to that old grade in the way of improvements. I took no estimate of it. The road is completed and in full operation, with station buildings and passing tracks and some buildings for repair shops at each end, and it is in running order and daily trains passing over it.

As to the condition and value of the old grade between Clinton and Osceola at the time it was taken possession — by defendant The Kansas City & Southern Railway Company, witness says:

I should judge it was in good condition. As to the work at
124 this end of the road through Jackson and Cass counties, there had been more care taken in finishing up the work, and I should judge it was in very good condition. There would be some clearing to do by timber having grown over it, and so on, but the work was in very good condition. The masonry especially was very well done, I think. The value of that 26 miles of grade between Clinton and Osceola, including masonry, at the time it was taken possession of by the defendant company was, I suppose, about $140,000 or $150,000; $140,000 I have estimated it as being worth. It was during the years 1871 and 1872 that the grading was done between Clinton and Osceola by the Memphis & Mobile Railroad Company.

Cross-examination:

In my estimate of the value of the old Kansas City, Memphis & Mobile between Clinton & Osceola I included $15,000 for right of way. I do not know of my own knowledge that the $15,000 for right of way was ever paid. I mean for right of way between Clinton and Osceola, 26 miles. That sum would not procure the right of way now. I did not assist in procuring any of the right of way in 1872. I had no personal knowledge of the value of right of way at that period in that country other than a general knowledge of the value of land and the great desire there was among the citizens to have the road built. I never was over the work while it was in progress. I went over the work between September 15th of last year and the end of the month—between the 15th and 30th of September, 1887; that was the first time I ever went over the work
between Clinton and Osceola. I have no personal knowledge
125 of the quantity of work that was done there by the Kansas City, Memphis & Mobile railroad other than from such documents as were placed in my hands by parties at Osceola and from conversation with some parties who were connected with the company at the time the work was in progress at Clinton.

My testimony is measurable, founded upon hearsay evidence. I assume that the documents I saw in manuscript and printed matter, statements made, not officially, however, but published as being statements from the company—that they were correct. I refer — a

history of St. Clair county published a few years ago by parties who took subscriptions published in a book—a printed volume.

I also saw copies of certified estimates from Mr. Greenwood, who was chief engineer of the road during its construction, and which are now in the hands of Mr. Mead, at Osceola. Mr. Mead was a director in the Kansas City, Memphis & Mobile Co. during its construction. I have also examined reports made by a committee of citizens to a public meeting held in Jackson county as to the moneys that had been expended belonging to the county in the construction of the Kansas City, Memphis & Mobile road. My testimony as to the value of the work done is predicated upon the contents of the printed volume above named, upon copies of certified estimates certified by the chief engineer of the company for the construction of that part of the road, and from the proceedings of the public meeting held in Jackson county. I found in the volume referred to statements that there was a vast amount of money stolen and illegally appropriated by the projectors of that road about the time it was built. A committee of citizens of St. Clair county ex*h*onorated Mr. Mead and one other gentleman, whose name I have forgotten, as not being implicated in those frauds. I am not aware that the history of St. Clair county shows that Mead received a large amount of money for which he had no vouchers.

126 I learned that the Kansas City & Southern railway went into possession of the road between Osceola and Clinton in December, 1882, from Robert C. McBeth, who claimed to have made a contract with Mr. Bailey, or parties whom Mr. Bailey represented, that a certain portion of the road should be finished within a given time; saw McBeth at Clinton. He gave me those dates. I think there was no conversation other than that in connection with the commencement of the work and matters of that nature that I desired to learn from him. Mr. McBeth furnished me the information that was within his knowledge. He referred to some papers that he had in connection with it. I don't suppose he knew what I was seeking the information for. I had known Jr. McBeth a number of years ago. I informed him that I — employed by the Nettleton party. I do not know of my own knowledge that McBeth is one of the gentlemen who is put down as having received a large slice of that fund that he has never accounted for. Everybody connected with the road, I suppose, had a divide; I judge so. There was a divide, I suppose. The report of the meeting of the citizens in Jackson county as to the money expended on the road was not a correct criterion to judge what moneys were actually expended. The report of the committee is lumped. There are some items that go into detail, but there are large amounts that are lumped. I found, among others, for the purpose of enlightenment as to the cost of the roadway—I found that $53,000 is put down as the cost of the right of way.

I have no personal knowledge as to when the Kansas City & Southern Railway Company entered into posses- of the road-bed of the Kansas City, Memphis & Mobile between Clinton and Osceola

or what the actual value of that road-bed was at that time. I
127 do not personally know that the Kansas City & Southern Railway Company has taken possession of any part of that old Memphis & Mobile grade in Cass county. The only knowledge that I have is from the filing of papers and finding stakes set on the line of the road that I was told were set by the engineers of the Kansas City & Southern Railway Company. I do not myself know as a matter of fact who set them. I never saw any of the Kansas City, Memphis & Mobile officials do any work in Cass county myself. I do not know from personal knowledge who did that work. I know the parties who had the contract, and I know they were paid by the Kansas City, Memphis & Mobile Railroad Company. I never saw them paid. I do not know anything about it, really, except from information I have received from documents. I have no personal knowledge as to the acquisition of right of way in Cass county.

As to the right of way in Jackson county witness says:

"I made out all the land maps, and they were furnished from my hands to the agents employed by the company in obtaining the right of way, but I cannot cite any instances where I have personal knowledge of the right of way having been obtained under those papers."

Redirect examination:

Question. "Was there an old grade over that part of the road between Clinton and Osceola prior to the time when you say the Kansas City & Southern went to work there to construct their road?"

Answer. "I can only answer that question by saying that the banks are old—bear evidence of having been of that date—of having been constructed about that time—and from general notoriety that the Kansas City & Southern have laid their track on the old grade of the Kansas City, Memphis & Mobile."

I was at Clinton when the work was in progress there by the Kansas City, Memphis & Mobile as far down as Osceola, and
128 on a number of occasions talked to Mr. Greenwood, who was their chief engineer. He was appointed chief engineer of the Clinton & Memphis branch of the Tebo & Neosho railroad. That was afterwards consolidated with the Clinton & Kansas City branch of the Tebo & Neosho railroad, and the joint companies were consolidated into the Kansas City, Memphis & Mobile. Mr. Greenwood continued to act as chief engineer of the part south of Clinton and Mr. Smith chief engineer of this part of the road.

I can only say in general terms that the work was being prosecuted vigorously at that time between Clinton and Osceola. Mr. Greenwood, the chief engineer, was a citizen of Clinton.

Question. "With what degree of certainty can you determine by looking at the grade in its present condition that it was constructed prior to the time when the Kansas City & Southern took possession?"

Answer. "The banks were all well consolidated and settled, and there are no other grades in the neighborhood anywhere—no other old grades. As an expert in that kind of work, I would judge it was made at the time the documents here represented it as being made—15 or 16 or 20 years ago—15 or 16 years ago."

McBeth was a director in the Kansas City, Memphis & Mobile. According to general notoriety and common report, the Kansas City & Southern Co. has been operating its line over the route between Clinton and Osceola 5 or 6 years, I suppose.

I knew Col. Holt personally. He was the contractor who did a large part of the work through Henry county, I suppose, under the Tebo & Neosho branch first, and then that was merged into the Kansas City, Memphis & Mobile.

129 Recross-examination:

I can as an expert tell about the age of a grade of a railroad when I see it, but not with certainty. I can say whether it is old or new. I think I could tell whether a grade is 7 years old or 15, and whether it was 8 years old or 15, and as to whether it was 9 years old or 15; approaching it in that way, my answer must be measurably so. I do not profess to say what the age of an earth embankment is, but I can tell by the appearance of vegetation how long it has taken to grow—the brush and young timber to grow upon it—and how long it would take an undisturbed bank to give a vegetation of that kind.

I am not prepared to say that the entire grade between Clinton and Osceola was not regraded and refixed from beginning to end. I have not stated that. Of course they would fix it up and repair the damage. I did not see any young timber growing upon the embankments that would lead me to infer that the grade was about 15 years old or fifteen years since it was constructed; did not see any vegetation on the grade that would lead me to infer that it was fifteen years since the grade was constructed. The criterion by which I judge as a civil-engineer expert that the grade has been there about 15 years as it exists now or as it existed at the time I went over it was the masonry has an old appearance. The banks are well compacted, well consolidated, and settled thoroughly, and everything has an old look. The masonry would not look about as old if it was 7 years old as it would if it were 15. I did not examine the masonry very carefully. I did not stop and go under the culverts and examine the masonry. Some of (a large portion of it) — I was not any closer than the rear of a car. I think I can tell from the rear of a car whether or not the cul-
130 verts and masonry were 7 years old or 15 years old. I rode over the entire line between Clinton and Osceola in a car going at the usual speed. They don't make ver- fast time; 15 miles an hour, I suppose. Rode over it during the day about the 23rd or 24th of September, 1887; rode in a passenger coach of the Kansas City & Southern Railway Company. The only inspection of culverts and bridges made along that line I made from the end of that

car, travelling along at that rate of speed. I could tell while so travelling along over the road nearly the amount of mason-work in it, and within a fraction the amount of timber in a trestle. I do not know whether there was any trestle-work on the road at the time the Kansas City & Southern took possession. There is trestle-work there now; it has all been remodeled. I judge some of the trestle-work remains of the old work, but I could not tell you positively; could not say how much; could not approximate it. My object in passing over the road was not for the purpose of finding out what work had been done at present, but the value of the old grade. According to my knowledge of the trestling, portions of it was part of the original work that was done by the Kansas City, Memphis & Mobile. I think part of it is old work. I cannot undertake to go into particulars and say that I am as certain of that fact as any other fact I have testified to in this deposition. It looks to me as if a part of that was part of the old trestle-work of the Kansas City, Memphis & Mobile. I must say that the grade of the road is old, the masonry is old, and the trestle-work I judge part of it to be equally as old.

131 JAMES I. BROOKS sworn:

Age, 38 years; resident of Boston; banker & broker; was connected with the Kansas City & Southern Construction Company, at one time treasurer and afterwards president, and still hold those offices. I was the owner of the Kansas City, Memphis & Mobile R. R. and its franchises and property. That property was transferred to the construction company. At the time it was transferred to the construction company the property consisted of a road-bed, franchises, rights of way, and was in a generally bad condition, having lain for some 8 or 10 years. The bridges which had been built had rotted away, but the abutments were still in good condition. The road-bed from Kansas City was not in as good condition as the Osceola end. There was a tunnel. It was not quite completed, and the embankments were in good condition generally. Down at the lower end of the section running from Clinton to Osceola it was in better condition, as I have stated, and the stone-work was in exceptionally good condition; practically as good as when put in. The property consisted of rights of way, real estate that in some instances had been paid for in fee and in some cases rights of way given by gift It consi-ted of rights in depot grounds in Kansas City and the embankments and abutments for bridges. There were a good many old ties lying there all around, practically good for nothing, the rails having been taken up and the ties thrown aside. I believe the old company sold the rails. There was about 40 miles of road-bed in the upper section and 30 in the lower. There was an approach to Kansas City and a right of way into the city. It is owned in fee. I have the deeds. That property was conveyed to the construction company. I have forgotten the exact
132 date; I think some time in 1880. I am not certain. The construction company expended money on this property. They expended $20,000 or $30,000 out there. The construc-

tion company had no other property. This is the only property they had, and it has no other property now. The property was assigned by the construction company to myself as trustee. So far as I know, the property is lying in the same condition in which it was left by me, and I presume it is subject to the control of whoever has the legal title to it. The property acquired by the construction company by the purchase of the Memphis & Mobile railroad was the only property the company ever acquired, and the entire object of the formation of the construction company was to acquire this property and the completing and putting it into condition for a railroad.

Cross-examination:

I do not know that my last answer is untrue. I have been president of the Kansas City & Southern Construction Company. There is nothing in the charter of the company about the Kansas City, Memphis & Mobile railroad. Of course, there is nothing of that kind in the by-laws. There is always a definits object for the formation of a corporation, and in making the charter they have to comply with certain technicalities and legal forms, but the charter of the construction company was created and obtained in order to develop this property.

I was president and am now and have been since 1880 continuously. I am satisfied that other parties by fraud have pretended to obtain possession of this corporation, but when a man goes to work and irregularly elects directors and then undertakes to do anything by the directors elected by fraud, it is a very serious question whether they have a right to do it in any way, shape, or manner. I am not the only party who represents the con-
133 struction company. There are other stockholders. I have been president from its organization and am president now. There is no mistake about it. I said these people had by a fraudulent process gone to work to get control of the corporation. I have the records; I mean of subsequent meetings that have been held—subsequent to the meeting of the old corporation. A demand was made on the old secretary, who went out of office, for the records, but he declined to give them up. Mr. Ripley, Mr. Tenney, myself, Mr. Cramm, and Mr. Jernegan are directors. Mr. Cramm lives at Cambridge; the other gentlemen in Boston. I have forgotten his first name. I cannot remember the street and number. He lives at the south end. He is a doctor.

I cannot remember the date of the meeting of directors at which we voted a majority of the stock. At that meeting I was appointed president for the ensuing year. They pretended to have gone out and held a subsequent meeting a-d undertook to maintain that they had appointed a new president. I cannot tell the year. I think it was the annual meeting. It was along somewhere in the eighties. I do not understand that I was deposed as president. I never received any notice that I was ousted. They had no authority to oust me. It was an annual meeting, and of course new officers

were appointed at that meeting. I have attended a good many meetings of the board of directors of that company. They were held in Boston. They did not have the old records, because they went to New York and demanded the records, and they refused to give them up. I have never sat in any meeting with Mr. Tenney nor with Mr. Ripley. A majority of the board of directors have attended a meeting with me since. I mean a majority of the board of directors as elected then. That was a meeting for the election of officers. Mr. Jernegan was at that meeting. Mr. Cramm,
134 Mr. Ripley, Mr. Tenney, and myself and Mr. Wheeler, I think, was present. They undertook to hold two meetings in one. They admitted that I was the presiding officer—the president—they did not dispute it at all. There had been no regular meeting of the board. There had been action by Mr. Ripley and Mr. Tenney to undertake to foist two fraudulent directors and create a board, but the action was fraudulent, and I don't care what they did, the whole thing was a fraud from the beginning.

I have some deeds of the Kansas City & Southern Railroad Company, 30 or 40. I cannot give the names of the parties who made the deeds. I said I had the deeds. I have not. They are in the possession of the construction company. They are all recorded. I am not the custodian of the deeds. I presume whoever the office is provided by the by-laws is the proper custodian. I do not know who the custodian is. I am the president of the company. I have not seen these papers for a good many years. When I said I had possession of them I meant that the construction company had them. I do*d* not mean that I was the construction company. I presume these papers are in Boston. I could not tell just where they are at present. I have an idea, but I am not certain if they are there. I think they are filed away with some old papers, but I cannot tell just where.

Mr. Cramm, I think, is the secretary of this organization I spoke of. I do not know whether he is the official custodian of the papers or not. I should have to look at the records. I do not know who is the custodian of them. They are all recorded. I think I paid for the recording of them, also for the company.

I don't think I ever saw Mr. Briggs. I don't think the construction company ever got any deeds from Mr. Briggs. The property for which I hold the thirty or forty deeds is rights of way of
135 the Kansas City, Memphis & Mobile railroad all over the line—what property was turned over to me when I bought the road. They are all recorded.

Deposition of J. B. Colt.

My name is James B. Colt. I am forty-nine years old. My residence is Clinton, Henry county, Missouri. I am a farmer and railroad contractor. I was one of the contractors who built the grade of what was known as Clinton & Memphis Branch of the Teho & Neosho railroad, from Clinton, in Henry county, to Osceola, in St. Clair county, Missouri. I constructed about twenty miles of said

grade. Capt. William Weaver built the remainder—about five miles. I made the contract to build that grade with A. D. La Due. He was acting as general superintendent of construction.

Q. State what they paid you for construction that grade by the yard.

A. My contract price was, I think, twenty-seven cents per yard, with a five-hundred-foot free haul. After five hundred feet, a cent per yard until it made the excavation price. My whole contract price was between seventy-five and eighty thousand dollars, to the best of my knowledge. I am not certain of the exact amount, as I have lost my book.

Q. Have you the original books and estimates upon which you were paid?

A. No, sir; I have not.

Q. Can you state what became of the books?

A. When I moved from here to St. Louis I was not here and the folks left them in the garret, and when I came back I could not find them, and I have never seen them since.

Q. State what railroad company, if any, is now using and controlling this grade which you built about sixteen years ago.

136 A. The Kansas City & Southern, I believe.

Q. State, if you know, about how long they have been running this road.

A. About five years.

Q. State, if you know, who built the stone-work for that road—pillars, culverts, and other necessary stone-work.

A. Frank McCabe, who then lived in Sedalia, Mo. He is dead.

Q. State how much stone-work he did.

A. McCune did all the stone-work on my contract. I cannot say further.

Q. State the character of that work, whether good and substantial.

A. It was good sandstone work.

Q. Was that very heavy stone-work?

A. You might say it was as heavy as I have ever seen. Some of — wall was as heave as I have ever seen—two and one-half to three feet.

Q. At the time the Kansas City & Southern took charge of this grade and stone-work what was its value compared with its cost?

A. I should say one-third of the grade had wasted and washed away.

Q. State what that character of stone-work was worth at the time of its construction.

(Objected to by defendant counsel as incompetent and irrelevant.)

A. It was worth for abutments or second-class work about eight dollars per yard, and for culverts or third-class work five dollars per yard. I have seen the abutments near Judge Owen's, near

137 Clinton, and the piers at Grand river, and, to the best of my

knowledge, they were all right when this company took charge of the road.

Q. State if you know how much grading the Kansas City & Southern Company had to do when they commenced laying their track.

A. I can't say how much. They had to do some all the way along. It was a narrow road-bed prepared for a narrow-gauge road. The Kansas City & Southern made no change in the stone-work, to my knowledge.

Cross-examination by JOHN O'GRADY, solicitor, attorney for defendants:

Q. You state in your examination-in-chief that about one-third of the track constructed by you washed away. Now, state how much cheaper that grade could have been constructed five years ago than it was when you built it.

A. I say it could be done about ten cents less per yard—between a quarter and one-third less—and the stone-work in the same proportion.

Q. State if you know whether the right of way had ever been procured over the road you constructed.

A. All I know is that I had no trouble. I don't know of my own knowledge.

Deposition of Thomas K. Hanna.

Reside in Kansas City; have lived there about twenty years. I was one of the three trustees in whom the title to the property of the Kansas City, Memphis & Mobile Company was at one time vested. The trustees sold said property to James I. Brooks.

Witness files as Exhibit "A" a copy of the deed to Brooks.

Prior to January 6th, 1881, there was a contract entered into extending the time of the completion of this work or that part of the work specified in the deed to Brooks, and it was in writing.

138 Witness files Exhibit "B" to his deposition and states that it is a copy of the contract, as he recollects it.

The three trustees were acting for the company as agent to purchase the franchise, right of way, &c., of the original Kansas City, Memphis & Mobile railroad.

Witness has no recollection of a preliminary contract which some of these gentlemen entered into with Brooks concerning the sale to him of said railroad property, and has no recollection of ever having seen such a contract. Witness is shown paper, which is marked Exhibit "C," purporting to be such a contract, and states that the parties whose names appear to that paper were some of the parties for whom he acted as trustee. Witness states that all the parties for whom the trustees acted knew about and acquiesced to the sale made to Brooks, as evidenced by a deed executed by the trustees,

Exhibit "A" to this deposition; states that the deed was presented to all of them, and his recollection is that they all signed it. The terms of the final contract between the trustees and Brooks for the sale of said railroad property were all set forth in the deed to said Brooks, Exhibit "A" to this deposition. The railroad was never surrendered by the construction company under the terms of the preliminary agreement, marked Exhibit "C." Witness has no recollection of any such surrendering.

I have no recollection of ever accepting such surrender. The trustees were appointed either at or before the date of the deed from Bancroft to them. It was about the same time. The deed was made after they became trustees.

Cross-examination:

The trustees conveyed to Brooks. Brooks paid the money—the purchase-money—for the road. There was a forfeiture clause in his contract which he had not complied with. I have no knowledge of the conveyance of his interest to the construction company. He might have so conveyed. There were other parties be-ides
139 Brooks figuring on it. We extended the time of the completion of the road. By Brooks' contract the road was to be done to a certain point by the 1st of January, 1881, and in September we made an extention of that time. It was the Kansas City & Southern—I think it was the Kansas City & Southern Railway Company; it might have been the construction company—it was somebody that was building the road. I might recollect it definitely if I saw the paper. My recollection is that it was the railroad company. The road was not completed in the time specified in the contract with Brooks. Brooks never completed it—that is, Brooks himself. The road was about to be forfeited by Brooks; the forfeiture was about to expire and an extension of time was asked, I presume, by the assignees of Brooks. The contract was not carried out by Brooks, and these people, claiming under Brooks, asked for an extension. I think it was never granted, the extension of time, as I recollect it. I think it was not altogether a new contract. Brooks had not completed the road, which is part of his contract. Mr. Brooks owned the road. He had a quitclaim deed to the road, but he had agreed that if he did not complete a certain road within a certain time it should be forfeited. Now, the terms of the forfeiture were all changed by this new deed. It was an extension of time to complete the road in which the engineers entered into in regard to forfeiture. It was on account of these terms of forfeiture in that original contract with Brooks that we made this new contract with the Kansas City & Southern Railroad Company. Brooks had not lived up to his first contract, and these people asked an extension, and we were unwilling to grant the extension unless it was under certain conditions. Different terms of forfeiture were put in. One contract was that he should forfeit the road
140 and franchise, the other was to pay so much money, and if they did not do it this time they were to forfeit the money

instead of the franchise. This new contract was made with the Kansas City & Southern Railroad Company. The time for the forfeiture of our contract with Brooks had not expired; it was approaching time a few days for the expiration, and these people, being assignees under Brooks, asked us to give them an extension of time to complete the road. Brooks could not perform his contract so far as completing the road was concerned. It was part of the original intent that he was to forfeit the road if he did not complete the road; but by the new contract there was no forfeiture of franchise or right of way, but in lieu thereof he was to forfeit money. By he I mean the assignees of Brooks. I presume it was the Kansas City & Southern Railroad Company that deposited the twenty-five thousand dollars.

Redirect examination:

I could not say that Exhibit "B" was a de-ds; it did not have anything, only extended the time with regard to the forfeiture. Not being versed in legal phraseology, I should call it a contract. It might be a deed. It speaks for itself. Exhibit "B" was executed at the request of the owners of the franchise and road-bed. By this I mean the parties to whom Brooks had assigned. I have no recollection the Brooks was present at the transaction.

Exhibit "A" being a deed to Brooks, and the Kansas City & Southern Railway Company being Exhibit "B," and the only contracts ever made by the trustees respecting the property.

141 *Deposition of Benjamin McLean.*

Have resided in Kansas City nearly twenty-three years; was one of the trustees in whom the title to the property of the Kansas City, Memphis & Mobile Railroad Company was at one time vested. The other trustees were John B. Bancroft and Thomas K. Hanna. They sold the property to James I. Brooks for nineteen thousand dollars and something. It is expressed in the deed. The consideration was paid by Brooks in money.

Exhibit "A" to Hanna's deposition is a copy of the deed made by the trustees to Brooks. Prior to the time of the completion of the road by Brooks, according to the terms of said deed, a contract concerning the property was entered into between said trustees and the Kansas City & Southern Railway Company; same was in writing.

Exhibit "B" to the deposition of Thomas K. Hanna is a copy of the contract last referred to. I had no knowledge of the preliminary contract, Exhibit "C" to Hanna's deposition, until here recently, and that only by hearsay. The parties whose names appear to that paper were some of the parties for whom we acted as trustees. The trustees acted for a party of gentlemen who got together to purchase that property with the intention of holding and selling it again to some parties in whom we had confidence to complete the railroad, expecting to sell it at cost and interest. All the parties

for whom we acted were relying on the sale to Brooks and consented thereto. I think Brooks was present when we made the contract extending the time and changing the conditions, but I am not sure. It is so long since that I am not positive. The Kansas City & Southern had at that time, as I understood, become the purchasers
142 from Brooks. I understood the Kansas City & Southern Railway Company had undertaken to carry out the terms in the deed to Brooks, but what they did I do not know. They wanted further time, and we agreed to extend the time for the carrying out of these conditions by them putting up twenty-five thousand dollars forfeit. That was all, I think. The terms of our agreement, as I understand them, were pretty fully set forth in our contract with the Kansas City & Southern Railway Company. I think they were drawn up by Judge Black.

Cross-examination:

The facts stated in Mr. Hanna's deposition are about as I understand them. The time of the completion of the construction was not carried out; at least they came and wanted further time. Of course I did not see what was done on the road. I don't know whether Brooks ever expended fifty thousand dollars upon the Kansas City & Southern railway. As a matter of fact I didn't know anything about Brooks nor the Kansas City & Southern Company's business or how much they expended upon this construction. I don't know whether the Kansas City & Southern Construction Company ever expended fifty thousand dollars or any part of fifty thousand dollars on the construction. They were governed by the conditions of extension of time for the construction; we were governed by the engineer's certificate on all his ruling to twenty-five thousand dollars, and on his certificate we had to surrender that brought forward the certificate; I believe it was the Kansas City & Southern. Somebody notified us that they would not be able to comply with the conditions of the deed to Brooks. I think it was Brooks. I was so informed by them that they could not comply with it. I could not *safe* definitely who I referred to, because there was Brooks and the engineer, and Mr. Martin was treasurer. He acted with all the companies. It was with Mr. Martin that I generally talked. Mr. E. L. Martin could
143 not tell exactly at whose solicitation Exhibit "B" to Hanna's deposition was executed. There was no surrender of the road. They merely came to us and asked for an extension of time, and we granted it by them putting up the forfeiture. I don't know all the conversation that transpired. There was no surrender. I remember that. I don't know anything of a verbal surrender and nothing tending to surrender. I think if there had been I would have known of the surrender. They came and asked for an extension of time. I don't remember of seeing them at all. They came and made the request and we referred them to Judge Black, our lawyer—I think it was Judge Black—and he drew up the papers and we signed them, and they put up the

money, twenty-five thousand dollars, in the hands of Mr. Hanna, who was acting for us three trustees, I think. I did not pay much attention to it. There was an extension of time if you call that a new contract, but nothing further. There was no contract, only what is here in writing, made between us. The deed from us to Brooks was for the forfeiture of the road back to us, but we did not want that. We wanted it built; we did not buy it to speculate on, and I know at the time we were a little afraid of the statutes of limitation running against the right of way, and we expected the money forfeiture, and they paid it up just as it reads there. I don't remember any conversation with Mr. Brooks about the ability or inability of the construction company to comply with the provisions of the deed to Brooks. I had no occasion to think of it, for it was not my own business. I did not attend to it; do not recollect my conversation with Martin. If I remember right we had but very little conversation. They merely asked for an extension of time, and we told them if they would put up the forfeit of money we would extend it, and they did so.

144 We referred them to, I think, Judge Black, who drew up the considerations. I think it was Judge Black. I know he drew up some of the papers; but we made the contract with the construction company at the solicitation of Brooks or the engineer, but which one I cannot tell. I don't think Mr. Bancroft was here. He might have been. We all signed the contract. We must have gotten together. There was a man called Young around about that time; cannot say whether Young dealt with us as a representative of the Kansas City & Southern Railway Company. It is too indefinite for me to say anything about it. I cannot remember. I do not think Young prior to the execution of Exhibit "B" stated to me that the Kansas City & Southern Construction Company has forfeited its right under the Brooks deed and had not the necessary means to go on, but that the Kansas City & Southern Railway Company would complete the road, and that he wanted an express and distinct agreement with the trustees in relation to the same. If he had asked for it he would have gotten it; and we did not give it. I cannot remember with whom the negotiations were made in behalf of the railway company. They might have been with Young, but still I don't think they were. I did not say that Exhibit "B" was made at Brooks' solicitation. I think I have told you almost everything that I don't remember. I did not say that I did not act as trustee; had no dealings with Young, J. E., respecting the Kansas City & Southern Railway Company. I said that I could not remember. I never heard it mentioned that the road would be surrendered by any one. I could not tell what was said exactly. I think Mr. Martin came and told what they wanted; in fact, there was not a great deal to talk about. They just told what they wanted us to do and we did it, and there was nothing to talk about.

145 It was intimated that they had not complied and wanted further time, and that was the reason that we granted further time to the Kansas City & Southern Railway Company. I did not know what the Kansas City Construction Company could do. They

might have said something about the inability of the construction company to complete the road, and we might have inferred it. They might have said they could not do it. I know that some one came and wanted further time. Somebody asked for an extension. I think it was Mr. Martin, who was acting as treasurer for some company, and I think he was treasurer of the Kansas City & Southern Railway Company. I know he was holding office at the time we surrendered the twenty-five thousand dollars. He came for it himself, and I told him we did not think they had built the road in good faith, and I did not surrender the money, and we got into a dispute about it. We did not pay the money at that time, but I approved it afterwards. I could not tell who asked the extension. There were so many parties I did not know which from which. I did not know one from the other; I could not tell who asked. Afterwards the same individual represented both companies. I don't — whether J. E. Young was an officer of the construction company or not. I know there was a man of that name. I know there was; but who he represented and whether it was the construction company or the Kansas City & Southern Railway Company, or both, I do not know; I think it was both. I cannot remember the detailed conversation. I can merely tell what they asked for and what we did. We have them Exhibit "B" there; that was the only thing we ever gave. It was not a new contract. I don't remember what conversation I had with Mr. Young prior to the making of Exhibit "B" to this deposition.

146 I don't know as I had any conversation with him. I do not think I would have any conversation with him, for the reason that I knew some of the other parties better. There was not but very little said. There was nothing that called for a conversation. I don't know as we met together at all to sign the new deed. I was very busy at the time and could not devote any length of time to it. I don't know who had authority to represent the railway company. I think the contract was made with Mr. Brooks. I think Mr. Martin was present, and Mr. Young might have been present. It was with some of these parties or with all of them. They were some of the parties we had been dealing with. I don't remember the details. I had no conversation, I am sure. Somebody asked for an extension and we granted it, and to the best of my remembrance it was either Brooks or Martin, or both, and I think Mr. Young was one, since you mentioned his name; I think I can remember. I know there was no surrender and was no offer to surrender or any thought of surrender that I ever heard of. While I do not remember the details, I remember nothing to recommend the acts done, and if anything was done I would remember it, because we were all interested in the completion of the road. We would all like to have seen it completed. My idea of surrender is if parties should make a deed and tell you if they could carry out its condition and would have to surrender the road or bond it, or give you a notice in writing to that effect. I cannot remember whether we were told by Mr. Young or by Mr. Brooks that the construction company would be unable to comply with the conditions of the Brooks deed. As I told you before, I know they requested an

extension of time of the conditions. They never told me the construction company would be unable to comply with the conditions in the Brooks deed; at least I have no recollection of any such thing. I don't think they told me so. I don't think they would admit it. They wanted an extension of time, and that is all I know distinctly.

147 We told them if they would put up the money we would grant the extension, and they did so. I heard some talk about conveyance by the construction company to the railroad company, but I had no official information. I don't know it as a matter of fact. I never had any notice that the construction company had gone out of business. I did not say that they would consent to —. I did not see them. I don't know of my own knowledge about the work that was done in the construction; if they had to build to Harrisonville or Belton on or before January 1st, 1881, of course, there would not be time to do it in the fifteen days, and we must have understood it that they would not have time to do it. I think they claimed that they had some work done down there—that they had considerable of it done—but I judge that they were not able to complete it. Well, if they had been they would not have asked for extension; that is apparent. I know as a matter of fact that they could not complete the road from Kansas City to Harrisonville within the time.

Redirect examination:

I don't know definitely who represented the one company or who represented the other; the same parties had come to me and represented both companies, and we did not inquire who they were and who they represented. All the terms and conditions with respect to the extension of time and the change in conditions expressed in the Brooks deed and reduced to writing are all shown in Exhibit "B" to the deposition of Mr. Hanna. I was not aware at the time of the negotiations that the construction company, September 13th, 1880, made the deed conveying the railroad property to the Kansas City & Southern Railway Company. It was optional with us whether they accepted the forfeiture or not; Exhibit "B" expresses the facts as I remember it now; Exhibit "B" was not a

148 deed; it was merely an extension of the conditions in the deed to Brooks.

Additional Documentary Evidence.

Served copy of deed of trust executed by the Kansas City & Southern Railway Company to the Farmers' Loan & Trust Company of New York, dated January 1st, 1883; conveyances of the property and franchises of said railway company, including its railroad, constructed and to be constructed, covering all property of the company of every kind and description then owned or thereafter to be acquired, together with all tools, incomes, rents, issues, and profits thereof. Said deed of trust is given to secure first-mortgage bonds

amounting to twenty thousand dollars per mile of constructed road, bearing interest at the rate of six per cent. per annum. Said deed of trust also provided that the railway company, as further security for said bonds, shall provide a sinking fund, which shall amount to one-half of one per centum of the principal amount of said bonds, to be set apart annually and invested by the trustees as in said deed of trust provided. Said deed of trust was filed for record April 30th, 1883, and duly recorded in the recorder's office of Henry county, Missouri.

Certified copies of reports made by the Kansas City & Southern Railway Company to the railroad commissioners for the year ending December 31st, 1883, and for the year ending December 31, 1886. In the report for the year ending December 31st, 1883, under the head of debt (amount of funded debt not detailed) the report states: "First mortgage provides for twenty thousand dollars per mile of first-mortgage bonds, which could only be issued by trustees upon actual completed road in lengths of five miles or more. These bonds bear six per cent. interest; Farmers' Loan & Trust Company of New York, trustee."

149 Under the head of amount of floating debt (not detailed) this report is blank.

In the report for the year ending December 1st, 1886, under the head of funded debt, the report says "none;" a-d under the head of unfunded or floating debt the report says "none."

Under the head of earnings and income this report says: "Total earnings, main and branch lines, sixteen thousand four hundred and thirty-three dollars and sixty-three cents."

Under the head of expenses this report says: "Total, $33,318.83."

These reports are both sworn to by William Bales, president of the Kansas City & Southern Railway Company.

150 In the United States Circuit Court at Kansas City.

B. SCHLESINGER *et al.*
vs.
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*

Defendants' Abstract.

The bill.

The bill alleges that on the 24th of May 1880, the Kansas City & Southern Construction Company, a Connecticut corporation, was the owner of certain property in counties of Jackson, Cass, Henry, St. Clair, and other counties in Missouri, known as the Kansas City, Memphis and Mobile railroad, running from Kansas City in the direction of Memphis, together with all the rights of way, road-bed, masonry property; also the franchise and right to construct, maintain, and operate upon and along said right of way a railroad; that on or before said date said construction company entered into a contract with plaintiffs to purchase from them a quantity of rails; that on the 7th day of October 1881, they began their suit on said

contract against said construction company; that said suit was begun by attachment writs issuing from said court to the counties of Jackson, Cass, Henry, and St. Clair against the property of said construction company, as before mentioned, to the sheriffs of said counties.

That abstract of attachment was filed with the recorder in each of said counties.

That by deed dated May 24, 1880, said construction company conveyed its property aforesaid to the K. C. & Southern Railway Co.

That the consideration stated in said deed for said transfer was $300,000 of the capital stock of defendant, and also a like sum in the first-mortgage bonds of defendant.

151 A certified copy of this deed is annexed to the bill.

That defendant has never delivered any stock or bonds to said construction company.

That said consideration is wholly colorable; that said deed was made wholly without consideration and was a voluntary conveyance to defendant, it holding the property without having paid anything for it.

Wherefore plaintiff prays that said deed may be decreed fraudulent and void as against the claim of plaintiff; that it may be cancelled, set aside, and for naught held as against the claim of plaintiffs.

This bill was filed Nov. 10, 1881.

On December 15, 1884, what is termed an amended supplemental bill was filed.

This bill is against the Kansas City & Southern Railway Co., the Kansas City & Southern Construction Company, the Farmers' Loan & Trust Co., and James I. Brooks.

The plaintiff states its claim against the construction company, the matters of attachment as alleged in the first bill, and alleges that there never was any corporation named the Kansas City & Southern Railroad Company; that such a corporation was intended to be formed, but never was formed.

That the defendant railway company was incorporated June 10, 1880, and not before.

That by its charter said road was not authorized to build a road in St. Clair Co., or anywhere south of Clinton, in Henry Co.

Said bill also recited the contract of May 24, 1880.

It also recites a deed dated Sept. 18, 1880, filed in the recorder's office of St. Clair Co. July 23, 1884, and in that of Jackson Co. July 30, 1884, whereby the said construction company deeds its said property to defendant railway company.

152 That defendant railway Co. has since 1880 been in possession of said property, and claims to own the same.

That said last deed recites a consideration of $250,000; that a copy of it is annexed to the last bill and made a part of it.

It alleges, as the other bill does, that nothing has been paid by defendant railway Co.; that the deed is voluntary and without consideration.

Said bill also says: "And your orators further aver that said property and property rights of defendant construction company became and were bound in equity for the payment of your orators' said claim and indebtedness aforesaid, and were and are a trust fund for the satisfaction and discharge of the same, and that defendant railway Co. received said deeds purporting to convey to it said property and property rights with full knowledge on the part of the officers managing and controlling said defendant railway Co. at the time of said purchase of the existence of said liability and indebtedness of said defendant construction company under said contract, as herein alleged, and said railway Co. became bound in equity and good conscience to pay off and fully discharge the same."

It alleges that defendant railway Co. executed a deed of trust on said property to secure 6,500 bonds of $1,000 each, dated July 1, 1883; recorded May 5, 1883.

That the lien of said deed of trust is junior to that acquired by the levy under the writs of attachment.

The bill alleges that plaintiffs' suit against the constructi-n company was removed to this court April 20, 1882.

The prayer is that the deeds of the construction company may be held voluntary, fraudulent, and void as against plaintiff's said claims; that it may be cancelled; that the property levied
153 upon, attached, and seized may be subjected and charged with plaintiff's claim, and that said property be sold by order and decree of this court to satisfy the claim; that a receiver be appointed to take charge of the property pending this suit.

Defendant railway Co. filed its answer February, 1885, which puts in issue all the material allegations of the bill. It alleges that the *the* pretended levies under the attachments were null and void; that there was no valid levy and could be none.

That it is the owner of the property described in the bill of complaint; that it purchased and paid for the same.

By supplemental bill filed April 7, 1887, it is stated plaintiff obtained judgment against said construction Co. for $35,901.39 on February 1, 1886.

That it was provided that execution should not issue without special leave of court until after *d*inal decree in chancery in this cause.

Plaintiffs' Evidence.

SCHLESSINGER, plaintiff, testified that construction company agreed to purchase 5,000 tons steel rails at $51.00 per ton in bond.

That plaintiffs had made for said company 1,470 tons according to its pattern. The rest was *n*aver made for it by its pattern. He said he had it made for another road and according to its pattern.

That not a pound of rail was delivered to the Co.; that the company, when it made the contract, deposited with plaintiffs $50,000, for which credit is given the company. One of the items *o*s plaintiffs' claim for damages i*f* $10,898, "commission del credere." The

plaintiffs sold their claim for damages to one Sargeant for $4,000; the money was paid by the check of Charles Merriam.

154 BROOKS, defendant: This witness seemed to testify as to contents of written instruments, and seemed to think the title to the property in controversy was in himself.

Plaintiffs introduced witnesses to prove cost of work on its road prior to the date when it was bought by defendant railway Co.

Plaintiffs filed copies of various instruments in reference to the attachments and records of same.

Copy of articles of association of the Kansas City, Memphis & Mobile Railroad Company. Deed by assignees of said company in bankruptcy conveying the property in controversy to J. D. Bancroft for $15,025.00, dated April 25, 1877.

Deed of J. D. Bancroft, dated April 27, 1877, to T. K. Hanna, Benj. McLane, and J. D. Bancroft, in trust for various persons, who subscribed various sums with which to pay the sum bid at the assignees' sale.

These names, together with the amount of the subscription of each, *is* set forth in the deed.

Deed, January 13, 1880, from said trustees to James I. Brooks, in words and figures following:

Whereas the Kansas City, Memphis & Mobile railroad with all its road-bed, rights of way, appurtenances and property whatever connected with said railroad, with all the franchises of the Kansas City, Memphis & Mobile Railroad Company, were by deed dated April 27, 1877, and recorded in the recorder's office for Jackson county Mo., at Kansas City, April 30, 1877, in Book B 27 on pages 59, 60, 61 and 62, thereof, conveyed to the undersigned T. K. Hanna, B. McLean and J. D. Bancroft, as trustees, and whereas the present owners of more than two-thirds of the moneys and shares furnished by the persons and firms named in said deed for

155 the purchase of said property, have directed said undersigned trustees as provided in said deed to sell said property to James I. Brooks, on the terms and conditions herein named for the sum of $19,156.87. Now therefore, know all men by these presents that we the said trustees party of the first part for and in consideration of said sum to us in hand paid by said J. I. Brooks, party of the second part, the receipt whereof is hereby acknowledged, have this day remised, released, conveyed, transferred and forever quitclaimed to said party of the second part, said railroad, rights of way, road-bed, appurtenances, property rights of property and franchises. To have and to hold the same unto him the said party of the second part and to his heirs and assigns forever subject, however, to the following conditions: Said party of the second part is to build said railroad from Kansas City to Harrisonville or Belton as said second party may elect, on or before January 1, 1881, so as to be ready for use as a railroad and also to build said railroad to the coal fields in Bates county to a point south of Butler, on or before July 1, 1881, so as to be ready for like use as aforesaid, and if said second party shall fail to build said railroad to said coal fields as aforesaid,

then the property hereby sold as aforesaid, shall revert to said first party and reinvest in them the same as they now hold the same, provided, however, that as soon as said second party shall expend the sum of $50,000 in the construction of a road-bed for said railroad, commencing at Kansas City and running southwardly that the said provision for a reversion of said property as aforesaid shall become null and void and of no effect whatever and upon said expenditure being made in the building of said railroad as aforesaid, by said second party of said sum of $50,000, then said trustees are to execute to said second party or his assigns, an instrument
153 in writing, acknowle lging the waiver and extinguishment of said forfeiture. In the event of a disagreement between said trustees and said second party as to the expenditure in fact by said second party of said $50,000, as aforesaid, as said second party may hereafter claim, then said trustees and said second party shall each select an arbitrator and they in case of a disagreement between them shall select a third arbitrator and in case either party refuses to select an arbitrator then the arbitrator chosen by the other party shall select two additional arbitrators, and the arbitrators selected in any of the above-mentioned modes shall determine whether such expenditure has been made by said second party, and such determination of said arbitrators shall be binding on both parties and may be enforced by judgment as provided by the laws of this State. Said first party covenants and warrants to and with said second party, that they, the said trustees, have not in anywise encumbered said property, and that the same is free from all encumbrances done or suffered by them."

A writing by which J. I. Brooks acknowledged he held the property purchased in trust from funds of persons who are or will be stockholders of the Kansas City & Southern Construction Co. This was dated February 27, 1880.

A quitclaim deed dated April 1, 1880, consideration one dollar, of the property to said construction company.

An instrument in words as follows:

"Whereas, the Kansas City, Memphis & Mobile railroad, with all its road-bed, rights of way, appurtenances and property, and rights of property, whatsoever, connected with said railroad with all the franchises of the Kansas City, Memphis & Mobile Railroad Company, were by deed dated January 13, 1880, sold and con-
157 veyed by the undersigned trustees to one James I. Brooks, on certain conditions expressed and contained in said deed, and whereas the title to said property subject to the said conditions has by sundry mesne conveyances passed to and vested in and is now owned and held by the Kansas City & Southern Railway Co., and whereas said last-named Co., has not been able to comply with and perform said conditions, within the time specified in said first-named deed for their performance; but is now willing to deposit and has deposited with said trustees the sum of $25,000 as a guaranty by said last-named company of the good faith of its purpose to build a railroad southeastwardly from Kansas City Mo., through the coal fields of Henry county Mo., and the iron field- of St. Clair

county, Mo., the receipt of which sum of $25,000 by said trustees is hereby acknowledged, and whereas, since the making of said deed to said J. I. Brooks, various sums of money have been expended for rights of way, engineering and other necessary expenses connected with the enterprise of building said railroad, in addition to the purchase price paid to said trustees on the execution of said first-named deed by them and whereas the owners of more then two-thirds of the money and shares furnished by the persons and firm named in the deed of said property to said trustees, dated April 27, 1887, have directed the undersigned trustees to execute and deliver this instrument to said Kansas City & Southern Railway Co.

Now therefore, in consideration of the premises and of the sum of one dollar to said trustees by said Kansas City & Southern Railway Co. in hand paid; the receipt whereof is hereby acknowledged; it is agreed stipulated and covenanted by and between said trustees for themselves and their said beneficiaries and said Kansas City & Southern Railway Co. as follows:

158 1. The conditions, provided and expressed in said deed of said trustees to said J. I. Brooks, are hereby annulled, rescinded, and extinguished and the said K. C. & S. Railway Company are hereby released and forever discharged from the performance of the same or any part thereof, and in lieu thereof the following conditions are hereby provided, that is to say: Said trustees or a majority of them, shall as said railroad from Kansas City, southeastwardly through the coal-fields of Henry county Missouri, and the iron fields of St. Clair county, Mo., constructed, pay out said $25,000 in the estimates and orders made and given in the building of said railroad by the chief engineer of said K. C. & S. Railway Co., and as soon as said $25,000 is so paid out and the additional sum of $15,000 is expended by the last-named Co. in the building of said railroad, then said last-named Co. shall hold said property so conveyed free from any and all claims of whatsoever kind on the part of said trustees or their beneficiaries or any of them.

2. It is further provided and covenanted that if said last-named Co. shall not expend the full sum of $25,000 in the building of said railroad before July 1, 1881, then so much of said $25,000 so deposited as shall, on the day last aforesaid, be unexpended, shall be forfeited to and become the money and property of said trustees for the benefit of their beneficiaries.

3. It is further provided and covenanted that as soon as said $25,000 so deposited shall be paid out and as soon as the chief engineer of said last-named company shall make his certificate of expenditure by said last-named Co. of said additional $15,000 in the building of said railroad, which sum of $15,000 shall be expended before October 1, 1881; then said trustees shall deliver to said last-named Co. an instrument of writing, duly executed and acknowledged evidencing the full compliance with and performance

159 of all the conditions herein contained by the said last-named Co., and if the sum of $40,000 shall not as above provided be expended by said Co. before October 1, 1881, then said property

shall revert to said trustees as by said deed to said Brooks provided."

This instrument is dated December 15, 1880.

To this is added a consent, signed by the subscribers.

T. K. HANNA and B. MCLEAN say that they have no recollection of any surrender of the property after the transfer to Brooks.

That on the 15th of Dec., 1880, neither Brooks nor the construction company had lived up to the contract as to the work to be done and were not able to do so by the date agreed upon; that the trustees were entitled to a forfeiture.

"And it was on account of these terms of forfeiture in that original contract with Brooks that you made this new contract with the K. C. & S. Railway Co., wasn't it? (Q. to Hanna). A. I should think so. Q. Then you did make a new contract? A. He had not lived up to his first contract, and these people asked an extension, and we were unwilling to grant an extension unless it was on certain conditions. Q. And there was something more; there was a new contract entered into, wasn't there—this contract of Dec. 15, 1880—and new terms of forfeiture were put in? A. Different terms; why, certainly."

McLean says somebody notified him that they would be unable to comply with the provisions of the Brooks contract; thinks it was Brooks.

From the evidence of these witnesses it appears that the object of the purchase by the subscribers was not to make money but to get the railroad built.

AMOS TENNY, on part of defendants, testified that he was
160 acquainted with Brooks; that he had known of defendant construction Co. and railway Co. since they were organized; was president and afterwards manager of the construction Co.

At the time the railway took possession of the road he was secretary and general manager of said company.

Q. Now state whether or not the construction Co. refused to go on under the contract, Exhibit No. 1, and state fully all the construction Co. did in reference to building and constructing the road under Exhibit No. 1.

A. The construction Co. employed J. E. Young as their chief engineer and J. I. Brooks was connected with him as the manager in Missouri; they did some engineering, ran two lines partially, and Brooks came home. I resigned the presidency and he was elected president; he and his Boston friends had raised some $75,000 on subscriptions; he then made at that time, when he came home, a contract with Naylor & Co. for 5,000 tons of rails, on which he paid $50,000; the balance of the $75,000 or upwards was expended in making the payment for the original agreement, as shown in Exhibit No. 1, and for the engineering expenses incurred at that time. None of the iron was ever delivered to any one or to said construction Co.

At the time this construction Co. became embarrassed that was

prior to October, 1880, and very soon thereafter the subscribers Mr. Brooks had represented that he had in Boston for the stock of the company refused to pay any more money, giving as their reason the fall in the price of steel rails, so as to lose all the $50,000 they had paid on account of steel rails to be delivered; they did nothing of any moment for some weeks after the first refusal of subscribers to pay until the terms of the contract of the sellers
161 of the road to Brooks had expired and was forfeited on the 1st day of October, 1880; the construction Co. had failed and could not carry out the contract with Brooks, which is Exhibit No. 1 to this deposition; they had no assets, except the road, after the subscribers had refused to pay any more money.

The construction company held the road conditionally under Exhibit No. 1.

The road was then surrendered to the trustees under the terms of the contract, Ex. No. 1. I mean it—it was surrendered by the construction Co. The trustees accepted the surrender and subsequently, in the month of Dec., 1880, made a deed to the K. C. & S. Railway Co.

Q. Why was this deed (Exhibit No. 2) made to the K. C. & S. Railway Co. by the trustees?

A. I was, at and some months previous to that time, the secretary and managing director of the Kansas City & S. Railway Co. I employed J. E. Young to go to Kansas City and see if he could make a purchase of the road after the surrender of the road to the trustees by the construction Co. He finally concluded a contract and conveyance of the property to the K. C. & S. Railway Co. on the terms and conditions set forth and provided in the deed, which is Exhibit No. 2 in this deposition.

Q. Why did you send Young to get the deed from the trustees when the railway Co. already had a deed from construction Co.?

A. The construction Co.'s rights, under all the conveyances that they had, had been forfeited by their own terms, and Young had represented to me that he had parties who would join him in a contract with the railway Co. to build a road who were responsible and who would advance the money sufficient to secure the deed on the terms stated in Ex. No. 2. That contract he represented could be made was made and entered into between him
162 and his friends under the name of Smith & Co., and the K. C. & S. Railway Co. immediately took possession of the road. That was during Dec., 1880, and the contractors proceeded to construct the same under the terms of the deed, and the Co. paid the money—that is, the $25,000 mentioned in Exhibit No. 2 was paid by the railway Co. at the time Exhibit No. 2 was executed and delivered, and the balance, which was called for under the terms of Ex. No. 2, was fully paid within the time stipulated, and the receipt of the trustees given that the whole $40,000 called for had been paid, the last payment being made about ten days prior to the expiration of the stipulated time. I was managing all the affairs of the railway Co. at that time and caused all the money to be paid and personally knew that the $40,000 was paid.

Q. When did the railway take possession of the K. C., M. & M. R. R.?

A. Immediately upon the execution of the deed, Ex. No. 2.

Q. Were you secretary and director and had you the management of the financial affairs of the K. C. & S. Railway Co. from the time of its organization, June 10, 1880, up to 1882?

A. I was secretary and had the management of its financial affairs including that time.

Q. State whether Naylor & Co., complainants in this case, made any claim against the K. C. & S. Construction Co. for any balance due them prior to the time that the K. C. & S. Railway Co. took possession of the old road-bed of the K. C., M. & M. railroad under either the deed from the K. C. & S. Construction Co. or under the deed of which Exhibit No. 2 is a copy.

A. I never heard of any such claim being made in any way or shape until after December, 1880, *whether* the K. C. & S. Railway Co. took possession of the road.

Q. How long after the Kansas City & S. Railway Co. took possession was it that you heard of the claim of Nay lor & Co.?

163 A. It must have been several months, I should say. It was in spring or early summer of 1881. When I first heard of the claim of Naylor & Co. against the construction Co. the railway Co. had no knowledge whatever of the transfer referred to. I never heard of any such claim.

Witness said there never was any K. C. & S. Railroad Co. organized. Brooks and others had talked of organizing such a company, but never did.

Q. There is a deed attached to the complaint dated September, 1880, between the K. C. & S. Construction Co. and the K. C. & S. Railway Co.; what was the consideration that passed from the railway Co. to the construction Co. for that deed?

A. The consideration for that deed at the time of its execution was $100,000 of the income bonds of t-e K. C. & S. Railway Co. Those bonds are still outstanding and held by parties interested in the K. C. & Southern Construction Co. They all passed to the possession of George Ripley, who was the secretary and financial custodian of the assets and property of the K. C. & S. Construction Co. at that time, and what has become of the bonds since I have no knowledge.

Q. When did the K. C. & S. Railway Co. deliver to Ripley, a-secretary and financial agent of the construction Co., the $100,000 in income bonds to which you have just testified?

A. They were delivered at the time of the delivery of the deed, the 18th Sept., 1880.

Q. State why, if you know, that $100,000 of income bonds were delivered by the railway Co. to the construction Co. at the time of the execution of the deed, the 18th Sept., 1880.

A. I consulted Mr. Campbell, the president of the railway Co., who is a lawyer, also the other directors, and we decided, in

164 view that the advances made by the construction Co. for the

purchase of the property might give them an equitable claim for some consideration, as we knew at the time they, the construction Co., were about to forfeit their contracts with the trustees of the property—we thought best to pay them a liberal consideration for a quitclaim to the property, and did so by paying them the $100,000 in income bonds.

On cross-examination:

Q. Then I understand, Mr. Tenny, that the recited consideration of $250,000 in the deed dated Sept. 18, 1880, was not in reality paid to said construction Co.?

A. That was merely a hypothetical amount put into the deed without regard to what was to be paid.

Redirect:

Q. Mr. Tenny, will you give as briefly as possible a history of the contract that Brooks made with Naylor & Co., complainants in this case, for the 5,000 tons of steel rails, and on which the $50,000 was paid as you testified to?

A. Brooks, or one of the Boston directors, informed me of this contract and sent or brought me a copy of it, which was the first I knew that such a purchase was being made. $25,000 in cash was paid to Naylor & Co., the rails to be delivered from Europe. Rails began to decline very soon after the purchase, and long before any rails were to be delivered under the contract they called for another installment of the payment under what they termed to be the provisions of the contract. Mr. Ripley & I were not notified of this second call, and the Boston parties wanted us to help them out with part of the money; I objected to their doing so. None of the rails were delivered and the money was a dead loss, and it bankrupted the Co.

Q. Was any part of that road ever built in compliance
165 with the provisions of that deed, Exhibit No. 4?

A. All that was ever done by the construction Co. towards building the road was some engineering, running two lines, and not to exceed $1,000 worth of work done except the engineering expense.

Q. Was the sum of $50,000 expended on the construction of the road-bed, as provided in said deed No. 4?

A. It was not, nor to exceed $1,000 of that amount, as I have testified. The construction Co. failed in the summer of 1880—early in the summer—but they kept one or two engineers to work during the summer months part of the time; early in September of that year they gave up all hope of being able to comply with their contract with the trustees and proposed to sell the road to the railway Co. They abandoned their contract through instructions to Mr. Young and he commenced negotiations under my instructions as financial agent of said railway Co. and procured the deed of December, 1880, from the trustees, as hereinbefore stated in my examination, the trustees of the original owners of the Kansas City, Memphis

& Mobile R. R. Co. having accepted the surrender of the property from the construction Co.

Recross-examination:

Q. Mr. Tenney, were not the same parties who were interested in said construction Co. virtually the same parties, excepting Brooks, who formed the K. C. & S. Railway Co.?

A. A majority of the parties who organized the railway Co. never had anything to do with the construction Co.

Q. What, if anything, was paid into the treasury of said construction Co. by your said railway Co. for the property you state the latter acquired?

A. $100,000 of the income bonds of said railway Co., and such were paid to quiet the title of the said railway Co.

166 J. D. BANCROFT, one of the trustees, testified that the conditions in the deed by the trustees to Brooks were never complied with by him or the construction Co. "They only spent a small sum in making a few surveys and did nothing whatever to comply with the conditions of the deed, and on the 15th of December, 1880, they having only 15 day-' more time to complete their work, and the trustees knowing that it was impossible to build over 40 miles of railroad in 15 days when no provision was made for doing such work, entered into a contract with other parties for the building of the railroad and disposing of the interest therein;" "the deed was a conditional one, to be valid when certain conditions were complied with; not one of these conditions was ever complied with and the trustees considered the property forfeited by the terms of the deed."

Q. Now state why you entered into the contract of December 15, 1880, with the K. C. & S. Railway Co.

A. The road-bed was purchased by several public-spirited men of Kansas City for the purpose of keeping it out of the hands of other railroads or parties who might wish to acquire it for the purpose of not having a railroad built into Kansas City over it; other parties whose interests were against Kansas City's interests were intending to buy the railroad bed, so that the road should not be built, and the purchasers of this road-bed bought it for the express purpose of holding it until some parties would build a railroad from the coal-fields of Bates county into Kansas City. When we found that Mr. Brooks, of the Kansas City & Southern Construction Co., had forfeited their deed and done nothing to construct the road the trustees were very glad to enter into negotiations with other reliable and responsible parties who would build the road-bed from the coal-fields into Kansas City, and he therefore, fifteen days be-

167 fore the time in Mr. Brooks' deed expired, knowing that he had forfeited it and could not fulfill these conditions, entered into a contract with the Kansas City and S. Railroad Co. whereby they deposited $25,000 in a bank as a guaranty of good faith and agreed to build the road-bed; in addition to putting up the $25,000, which they did, they agreed to spend $15,000 more before the 1st

of October, 1881, or forfeit the whole thing back to the trustees; the K. C. & S. Railway Co. complied with those conditions."

Q. What knowledge, if any, did you have of the forfeiture of the road under the conditions of the deed of January 13, 1880, from trustees to Brooks?

A. We had the knowledge of the conditions of the deed and knowledge of the fact that no work had been done up to December 15, 1880. We knew it was impossible to build 40 miles of road in fifteen days, and therefore at that time considered the deed forfeited, and that Brooks and the construction Co. neither of them had any right, title, or interest therein or would not have on the 1st of January, 1881, being unable to acquire it at that time. He said further that the original purchasers of the road did so, not for the purpose of making money, and that they made none; their object was to get the road built.

JOHN O'GRADY AND C. O. TICHENOR,
Solicitors of Respondents, The K. C. & S. R. R. Co.

168 *Complainants' Documentary Evidence.*

In the Circuit Court U. S., Western District of Missouri, Western Division.

BERTHOLD SCHLESINGER *et al.*
vs.
THE KANSAS CITY AND SOUTHERN RAILWAY CO. *et al.*

Now come the complainants, and with leave of court file the following documentary evidence to be read by them and on their behalf upon the trial of this cause, to wit:

1. Certified copy of articles of association of the Kansas City, Memphis & Mobile Railroad Company.

2. Certified copy of order of district court of U. S. in and for the central division of the western district of Missouri adjudicating said Kansas City, Memphis & Mobile Railroad Company a bankrupt.

3. Certified copy of record in same court showing the election of assignees in bankruptcy of said company.

4. Certified copy of order of same court showing approval of said election of assignees and appointment of an additional assignee by the court.

5. Certified copy of deed of assignment of said bankrupt estate.

6. Certified copy of petition of the assignees of said bankrupt for sale of the roadway, etc., of said bankrupt.

7. Certified copy of order of said court directing such sale.

8. Certified copy of report of said assignees showing sale of said roadway, etc.

9. Certified copy of the order of said court approving said sale.

10. Certified copy of deed from said assignees to John D. Bancroft conveying road-bed, masonry, right of way, and appurtenances of said bankrupt company.

169 11. Certified copy of deed from John D. Bancroft to Thos. K. Hanna *et al.*, trustees.

12. Certified copy of deed from Thos. K. Hanna *et al.*, trustees, to Jas. I. Brooks.

13. Certified copy of deed from Jas. I. Brooks to the Kansas City and Southern Construction Company.

14. Certified copy of deed from same to same.

15. Certified copy of resolution of the board of directors of the Kansas City and Southern Railway Company extending the line of its road from Clinton, Henry county, to Osceola, St. Clair county.

16. Certified copy of resolution of same extending said line from Osceola, St. Clair county, to Saline, in Howell county.

17. Certified copy of the certificate of organization of the Kansas City and Southern Construction Company.

18. Certified copy of statute of Connecticut respecting proof of due formation of a corporation of said State.

19. Copies of two deed- purporting to have been executed by the Kansas City and Southern Construction Company, one to the Kansas City and Southern Railroad Company and the other to the Kansas City and Southern Railway Co., both copied in bill and admitted by answer.

20. The pleadings, proceedings, and record entries, including process and return of service thereof and judgment and including the entire record of the case of Berthold Schlesinger *et al. vs.* The Kansas City & Southern Construction Company, in this court.

All said proceedings and records being on file in this court are here referred to, and notice is hereby given to the defendants that the same will be read in evidence on the trial by and on behalf of the complainants.

Aug. 1, 1887.

JEFFERSON BRUMBACK,
GEO. W. McCRARY, *For Comp's.*

170 *Articles of Association of the Kansas City, Memphis and Mobile Railroad Company.*

These articles of association made and entered into this fourteenth day of August A. D. eighteen hundred and seventy-one, witnesseth:

That we whose names are hereunto subscribed have made and formed and do on this 14th day of August A. D. eighteen hundred and seventy-one, under and by virtue and in pursuance of chapter (37) thirty-seven, article (I) one and (II) two of Wagner's Statutes of the State of Missouri, being chapters sixty-two and sixty-three of the General Statutes of the State of Missouri and the acts amendatory thereof, make, constitute and form ourselves into a company under the name and style of the Kansas City, Memphis and Mobile Railroad Company, for the purpose of surveying, marking, locating, constructing, maintaining, using and operating a railroad for public use in the conveyance of persons and property from some point on the railroad of the Atlantic and Pacific Railroad Company between

ranges seventeen (17) and twenty-two, west of the fifth principal meridian in the State of Missouri, being the point on said Atlantic and Pacific railroad to which the Clinton and Memphis Branch of the Tebo and Neosho railroad shall be finally located and established, through the counties of Greene, Webster, Wright, Texas, Howell, Ozark, Douglass, Taney and Christian, in the State of Missouri, or some of said counties and into and through such of said counties as upon a minute survey shall be found to afford the most practicable and advantageous route for the railroad of said company from the said point of beginning to the southern line of the State of Missouri in the general direction of the city of Memphis in the State
171 of Tennessee, and to extend, construct, maintain and operate the said railroad across the State of Arkansas to a point on the Mississippi river opposite Memphis, and also to construct, maintain and operate a railroad from some point on the main line of the railroad aforesaid in the State of Arkansas to Helena in the State of Arkansas, in the general direction of Mobile in the State of Alabama; and also for the purpose of constructing, acquiring, maintaining and operating such connecting lines of railroad and branch railroads as may be convenient, necessary and useful to the traffic and business of the said company, and as the said company may by law be authorized to acquire, construct, maintain and operate, and also for the purpose of consolidating with leasing, purchasing and operating such connecting lines of railroad as by law the said company may at any time be authorized to consolidate with, lease, purchase and operate, and for the purpose of possessing and exercising all the rights, franchises powers and privileges which they may now or at any time hereafter possess and exercise.

The name of the said railroad company shall be as aforesaid the Kansas City, Memphis and Mobile Railroad Company, and it shall under that name and style continue and exist for the period and term of ninety-nine years from the date of the filing of these articles in the office of the secretary of state.

The length of the said railroad in the State of Missouri will be as nearly as can now be determined, from seventy to one hundred and thirty miles, depending upon the route through said counties or some of them which shall upon more accurate and minute survey be adopted.

172 The capital stock of said company shall be seven millions of dollars and is divided into seventy thousand shares, each share being of the denomination of one hundred dollars.

The number of directors of said company shall consist of thirteen (13) and they shall hold their offices until their successors are duly elected and qualified. The following-named persons, being a portion of those whose names are hereunto subscribed to wit, George Y. Salmon, Dewitt C. Stone, A. D. La Due, Peter A. La Due and Robert C. McBeth, whose residences are at Clinton, in Henry county, in the State of Missouri. Waldo P. Johnson and William O. Mead in St. Clair county in the State of Missouri, J. D. Hines and Robert B. Higgins, of Cass county, Missouri, John W. Reid, Robert T. Van

169 11. Certified copy of deed from John D. Bancroft to Thos. K. Hanna *et al.*, trustees.

12. Certified copy of deed from Thos. K. Hanna *et al.*, trustees, to Jas. I. Brooks.

13. Certified copy of deed from Jas. I. Brooks to the Kansas City and Southern Construction Company.

14. Certified copy of deed from same to same.

15. Certified copy of resolution of the board of directors of the Kansas City and Southern Railway Company extending the line of its road from Clinton, Henry county, to Osceola, St. Clair county.

16. Certified copy of resolution of same extending said line from Osceola, St. Clair county, to Saline, in Howell county.

17. Certified copy of the certificate of organization of the Kansas City and Southern Construction Company.

18. Certified copy of statute of Connecticut respecting proof of due formation of a corporation of said State.

19. Copies of two deed- purporting to have been executed by the Kansas City and Southern Construction Company, one to the Kansas City and Southern Railroad Company and the other to the Kansas City and Southern Railway Co., both copied in bill and admitted by answer.

20. The pleadings, proceedings, and record entries, including process and return of service thereof and judgment and including the entire record of the case of Berthold Schlesinger *et al. vs.* The Kansas City & Southern Construction Company, in this court.

All said proceedings and records being on file in this court are here referred to, and notice is hereby given to the defendants that the same will be read in evidence on the trial by and on behalf of the complainants.

Aug. 1, 1887.

JEFFERSON BRUMBACK,
GEO. W. McCRARY, *For Comp's.*

170 *Articles of Association of the Kansas City, Memphis and Mobile Railroad Company.*

These articles of association made and entered into this fourteenth day of August A. D. eighteen hundred and seventy-one, witnesseth:

That we whose names are hereunto subscribed have made and formed and do on this 14th day of August A. D. eighteen hundred and seventy-one, under and by virtue and in pursuance of chapter (37) thirty-seven, article (I) one and (II) two of Wagner's Statutes of the State of Missouri, being chapters sixty-two and sixty-three of the General Statutes of the State of Missouri and the acts amendatory thereof, make, constitute and form ourselves into a company under the name and style of the Kansas City, Memphis and Mobile Railroad Company, for the purpose of surveying, marking, locating, constructing, maintaining, using and operating a railroad for public use in the conveyance of persons and property from some point on the railroad of the Atlantic and Pacific Railroad Company between

ranges seventeen (17) and twenty-two, west of the fifth principal meridian in the State of Missouri, being the point on said Atlantic and Pacific railroad to which the Clinton and Memphis Branch of the Tebo and Neosho railroad shall be finally located and established, through the counties of Greene, Webster, Wright, Texas, Howell, Ozark, Douglass, Taney and Christian, in the State of Missouri, or some of said counties and into and through such of said counties as upon a minute survey shall be found to afford the most practicable and advantageous route for the railroad of said company from the said point of beginning to the southern line of the State of Missouri in the general direction of the city of Memphis in the State
171 of Tennessee, and to extend, construct, maintain and operate the said railroad across the State of Arkansas to a point on the Mississippi river opposite Memphis, and also to construct, maintain and operate a railroad from some point on the main line of the railroad aforesaid in the State of Arkansas to Helena in the State of Arkansas, in the general direction of Mobile in the State of Alabama; and also for the purpose of constructing, acquiring, maintaining and operating such connecting lines of railroad and branch railroads as may be convenient, necessary and useful to the traffic and business of the said company, and as the said company may by law be authorized to acquire, construct, maintain and operate, and also for the purpose of consolidating with leasing, purchasing and operating such connecting lines of railroad as by law the said company may at any time be authorized to consolidate with, lease, purchase and operate, and for the purpose of possessing and exercising all the rights, franchises powers and privileges which they may now or at any time hereafter possess and exercise.

The name of the said railroad company shall be as aforesaid the Kansas City, Memphis and Mobile Railroad Company, and it shall under that name and style continue and exist for the period and term of ninety-nine years from the date of the filing of these articles in the office of the secretary of state.

The length of the said railroad in the State of Missouri will be as nearly as can now be determined, from seventy to one hundred and thirty miles, depending upon the route through said counties or some of them which shall upon more accurate and minute survey be adopted.

172 The capital stock of said company shall be seven millions of dollars and is divided into seventy thousand shares, each share being of the denomination of one hundred dollars.

The number of directors of said company shall consist of thirteen (13) and they shall hold their offices until their successors are duly elected and qualified. The following-named persons, being a portion of those whose names are hereunto subscribed to wit, George Y. Salmon, Dewitt C. Stone, A. D. La Due, Peter A. La Due and Robert C. McBeth, whose residences are at Clinton, in Henry county, in the State of Missouri. Waldo P. Johnson and William O. Mead in St. Clair county in the State of Missouri, J. D. Hines and Robert B. Higgins, of Cass county, Missouri, John W. Reid, Robert T. Van

Horn, Thos. H. Mastin, John W. Polk of Jackson county, State of Missouri, are hereby named and appointed to be the directors of said company, and do consent to act in that capacity for the first year and until their successors are duly elected and qualified.

In witness whereof and under the authority of law, and for the purposes hereinbefore stated, we have hereunto subscribed our respective names and places of residence and have set opposite our respective names the number of shares of the capital stock of said company which we each subscribe for and agree to take and pay for.

Names.	Places of residence.	Number of shares.
Peter A. Ladue	Clinton, Henry Co., Mo.	One hundred.
Dewitt C. Stone	" " "	One hundred.
Robert C. McBeth	" " "	One hundred.
George Y. Salmon	" " "	One hundred.
Albert D. La Due	" " "	One hundred.
Waldo P. Johnson	St. Clair Co., Mo.	One hundred.
Wm. O. Mead	" "	One hundred.
173 R. T. Vanhorn	Jackson Co., Mo.	One hundred.
Thos. H. Mastin	" "	One hundred.
Jno. W. Polk	" "	One hundred.
A. L. Harris	" "	One hundred.
J. D. Hines	Cass Co., "	One hundred.
R. B. Higgins	" "	One hundred.
I. W. Reid	Jackson Co., "	Fifty.

STATE OF MISSOURI, }
County of Jackson, } ss:

Thos. H. Mastin, Robert T. Van Horn, and J. W. Reid and Dewitt C. Stone, all of the State of Missouri, being each duly sworn, on their oath say they are each stockholders in the foregoing association and are named therein as directors; that there has and before the making of this affidavit been subscribed in good faith to the capital stock in the foregoing association one thousand three hundred and fifty shares, amounting in the aggregate to one hundred and thirty-five thousand dollars; that said last-named amount is more than one thousand dollars of capital stock for every mile of railroad proposed to be made by said association, and that five per centum in cash has been paid in good faith in cash on all of said one hundred and thirty-five thousand dollars in stock; that it is intended in good faith to construct & maintain the railroad mentioned in said articles of association in the State of Missouri.

ROBERT T. VAN HORN.
J. W. REID.
DEWITT C. STONE.
THOS. H. MASTIN.

Subscribed and sworn to before me this 19th day of August, A. D. 1871.

174 [SEAL.]

ISAAC STIERS,
Notary Public.

Filed August 23, 1871.

EUGENE F. WEIGEL,
Sec'y of State.

STATE OF MISSOURI, *ss:*

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of the articles of association of the Kansas City, Memphis and Mobile Railroad Company and of the affidavit of four of the directors of said company thereto attached, filed August 23rd, 1871, as the same appears on file and of record as the law directs in this office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri.

Done at office, in the city of Jefferson, this seventeenth day of December, A. D. eighteen hundred and eighty-four.

MICH'L K. McGRATH,
Secretary of State.

[SEAL.]

175 UNITED STATES OF AMERICA, }
Western District of Missouri. }

In the District Court of the United States for the Western District of Missouri.

In the Matter of THE KANSAS CITY, MEMPHIS & MOBILE RAILROAD COMPANY, Bankrupt.

In voluntary bankruptcy.

TUESDAY, *February* 15, 1875.

This cause came on to be heard and the petitioning creditors being present by John K. Cravens, of counsel, and the said debtor, although duly served with process and now here solemnly called, comes not but makes default.

And thereupon and upon consideration of the proofs in said cause it is found that the fact- set forth in said petition are true, and it is therefore adjudged that the Kansas City, Memphis & Mobile Railroad Company became bankrupt within the true intent and meaning of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, before the filing of said petition, and it is therefore declared and adjudged a bankrupt accordingly.

And it is further ordered that the said bankrupt shall, within five days after the date of this order, make and deliver or transmit by mail, postpaid, to the marshal as messenger, a schedule of its creditors and inventory of its estate in the form and verified in the manner required of the petitioning debtor by the said act.

And it is further ordered that the case be referred to John D. S. Cook, one of the registers in bankruptcy of this court, to make adjudication thereon, and to take such other proceedings therein

176 as are required by said act; and, further, that the said Kansas City, Memphis & Mobile Railroad Company shall, on or be-

fore the 4th day of March, 1875, at 10 o'clock a. m., file with said register a schedule of its creditors and inventory of its said estate, duly verified, and that it attend by its chief officer before said register at Kansas City, county of Jackson, on said day, and thenceforth, as said register may direct, to submit to such orders as may be made by said register or by this court relating to its said bankruptcy.

And, further, that until otherwise ordered by the court the said register shall act upon the matters arising in the case at his office at Kansas at such time as he shall fix for that purpose.

And it is further ordered that the notice required herein by said act be published in the Kansas City Journal of Commerce, a newspaper published at Kansas City, county of Jackson and State of Missouri, in accordance with the rules adopted by the court governing proceedings in bankruptcy.

And it is further ordered that a duly certified copy of the adjudication be served upon the said Kansas City, Memphis and Mobile Railroad Company according to law.

TUESDAY, *March* 16, 1876.

At Kansas City, in said district, on the 15th day of March, A. D. 1876, before John D. S. Cook, register in bankruptcy.

Order made by register on marshal returned with statement of service of notice on creditors, as therein stated.

First meeting of creditors held pursuant to adjournment. The majority in number and values of the creditors who have proved their debts appear and make choice of Gardiner Lathrop, of Kansas City, Jackson county, Missouri, and Henry Flanagan, of Jefferson City, Cole county, Missouri, to be the assignees of the estate and effects of said bankrupts.

177 Choice of assignees approved by register. Each of said assignees ordered to give bond in the sum of $25,000, to be approved by the register.

Assignees notified of their election.

Memorandum of first meeting, list of creditors, choice of assignees, and return to marshal sent to clerk.

Gardiner Lathrop files acceptance of election and acceptance sent to clerk.

I hereby certify that the above is a true copy from my docket.

J. D. S. COOK,
Register in Bankruptcy.

Filed March 16, 1876, at 10 a. m.

FRIDAY, *March* 17, 1876.

Whereas Gardiner Lathrop & Henry Flanagan have been elected assignees herein and have accepted said trust—

It is now ordered by the court that said election be approved; and, further, that Turner A. Gill, Esq., of Kansas City, Jackson county, Missouri, be, and he is hereby, appointed additional assignee herein, and said register directed to assign the effects of said bankrupt to such three assignees as soon as they shall have qualified.

Assignment of Bankrupt's Effects.

In the District Court of the United States for the Western District of Missouri.

In the Matter of THE KANSAS CITY, MEMPHIS & MOBILE RAILROAD CO., Bankrupt.

In bankruptcy.

At Kansas City, in said district, on the 30th day of March, A. D. 1876, before John ——, register in bankruptcy.

178 WESTERN DISTRICT OF MISSOURI, *ss:*

Know all men by these presents that Gardiner Lathrop & T. A. Gill, of Kansas City, in the county of Jackson, & Henry Flanagan, of the city of Jefferson, in the county of Cole and the State of Missouri, in said district, *has* been duly appointed & by said court approved assignees of the estate of said bankrupt, Kansas City, Memphis & Mobile Railroad Company, now, therefore, I, Jno. D. S. Cook, register in bankruptcy of said court and having said matter in charge by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said Gardiner Lathrop, Turner A. Gill, and Henry Flanagan, assignees as aforesaid, all the estate, real and personal, of the Kansas City, Memphis & Mobile Railroad Company, bankrupt as aforesaid, including all the property of whatever kind of which it is possessed or in which it was interested or entitled to have on the 25th day of January, A. D. 1876, with all its deeds, books, and papers relating thereto, except such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act; to have and to hold all the foregoing premises to the said Gardiner Lathrop, Turner A. Gill, and Henry Flanagan and their heirs forever, in trust, nevertheless, for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

In testimony whereof I, the said register in bankruptcy, have hereunto set my hand and caused the seal of said court to be affixed this 30th day of March, A. D. 1876.

[SEAL.] JOHN D. S. COOK,
Register in Bankruptcy.

179 UNITED STATES OF *Missouri,*
Western District of Missouri, } *ss:*

I, Louis Schmidt, clerk of the United States district court for the western district of Missouri, hereby certify that the above is a true copy of the assignment of the estate and effects of the Kansas City, Memphis & Mobile Railroad Company, bankrupt, made by the register, to whom the petition of said bankrupt was referred

for adjudication in bankruptcy; that the said John D. S. Cook is a register in bankruptcy within and for the western district of Missouri, duly appointed and qualified, and that as such register the said John D. S. Cook was duly authorized to make such assignment.

In witness whereof I hereunto subscribe my name and affix the seal of said court this 1st day of April, A. D. 1876.

LOUIS SCHMIDT,
Clerk of District Court for said District,
By CHARLES E. HESS, *D. C.*

United States District Court, Western District of Missouri.

In the Matter of THE KANSAS CITY, MEMPHIS AND MOBILE RAILROAD CO., Bankrupt.

In Bankruptcy.

To Hon. Arnold Krekel, judge of said court:

The undersigned assignees of the above-named bankrupts come now and represent to the court that since the late effort to sell the road-bed of said bankrupt the assignees have had notice, through different parties, that at another sale said road-bed might find a purchaser and at a figure much in advance of that which formerly bid at public sale; and in consideration of this and at the
180 suggestion of various parties in interest the assignees respectfully ask the court to make an order for the public sale of said road-bed, rights of way, and all appurtenances, and that said sale be made free of all encumbrance save and except any taxes due or to become due, and at such time and place as the court may think best.

HENRY FLANNAGAN,
G. LATHROP,
T. A. GILL, *Assignees.*

MARCH 5TH, 1877.

Upon the application of the assignees of said bankrupt corporation for an order to sell the road-bed and appurtenances of said railroad, this day filed, it is—

Ordered by the court that said assignee- do sell at public auction, free, clear, & discharged of and from all liens and encumbrances, but nevertheless subject to the payment of any and all taxes and assessments of whatever nature, due or becoming due, at the city of Kansas, on Wednesday, the 11th day of April, 1877, the road-bed, masonry, and right of way of said Kansas City, Memphis and Mobile railroad, with the appurtenances, said sale to be for cash in hand.

And it is further ordered that notice of time and place of such sale be published in the Clinton Advocate, a newspaper published at Clinton, Henry Co., Mo., & the Kansas City Journal of Com-

merce, a newspaper published at Kansas City, Missouri, for 30 days prior to the date of said sale; also by 300 circular letters giving time, place, and terms of said sale, to be distributed as such assignees may deem for the best interest of such estate.

Such sale to be made subject to the approval of this court and when made to be forthwith reported to this court.

181 In the United States District Court for the Western District of Mo.

In the Matter of THE KANSAS CITY, MEMPHIS AND MOBILE R R. Co., Bankrupt.

To Hon. Arnold Krekel, judge of said court:

Now come the undersigned assignees and report to the court that in pursuance of the order of this court heretofore made the assignees did, on Wednesday, April 11th, 1877, at 2.30 p. m. and at the court-house door, in Kansas City, Mo., offer for sale and sell at public auction the road-bed, masonry, rights of way, and appurtenances of said Kansas City, Memphis & Mobile R. R., and at said sale the highest bidder was John D. Bancroft, of Kansas City, for the sum of fifteen thousand and twenty-five dollars ($15,025.00), and the said road-bed, &c., was struck off to him for that price. Said sale was made for cash and subject to the approval of this court and free and clear of all encumbrances and liens except all taxes due or to become due.

Before said sale these assignees, as ordered by this court, did advertise said sale for more than 30 days in the Journal of Commerce of Kansas City daily for said period, and did also advertise the same for more than 30 days in the Clinton Advocate, a newspaper published at Clinton, Mo., and did also print and circulate 300 postal cards. Copies of both said advertisements and said circulars are herewith attached.

The assignees further report that said purchaser, Bancroft, has paid to them the sum of five thousand dollars ($5,000.00), which shall be, by agreement between them and said purchaser, part payment on said purchase should the court approve said sale and he further comply with his contract by paying the remainder of said purchase-money.

182 But if, on approval of said sale, said Bancroft shall fail or refuse to pay said balance forthwith, then said sum of $5,000.00 to be regarded as forfeited and as measure of damages for non-compliance with said contract of purchase; but should the court not approve said sale, then said sum shall be returned to said Bancroft. Said agreement is reduced to writing, signed by the parties thereto.

The assignees are assured and rely implicitly on the assurance that Mr. Bancroft is the representative of a number of leading business men of Kansas City who are about to take hold of this enter-

prise, and their prime object is to complete the road or effect its completion, and the assignees ask the court to approve the sale.

Respectfully submitted.

TURNER A. GILL,
GARDINER LATHROP, AND
HENRY FLANAGAN, *Assignees.*

MONDAY, *April 16th*, 1877.

Whereas Turner A. Gill, Gardiner Lathrop, and Henry Flanagan, assignees in bankruptcy of the estate and effects of the Kansas City, Memphis & Mobile Railroad Company, bankrupt, did on April 14, 1877, file a report of the sale of the road-bed, masonry, rights of way, and appurtenances of said Kansas City, Memphis & Mobile railroad to John D. Ban*krupt*, of Kansas City, for the sum of fifteen thousand and twenty-five dollars in cash, free and discharged of all liens and encumbrances, except all taxes due or becoming due:

It is now ordered by the court that such report and sale be,
183 and the same are hereby, approved.

Ordered further that said assignees on payment to them of the said sum of fifteen thousand and twenty-five dollars, the purchase price aforesaid, execute and deliver to the purchaser a deed to said property.

Ordered further that said assignees forthwith deposit the entire purchase-money so soon as received in the designated depository of this court, the First National Bank of Jefferson City, Mo., to the credit of said bankrupt's estate.

UNITED STATES OF AMERICA,
Western District of Missouri, Central Division, } *ss:*

I, Louis Schmidt, clerk of the district court of the United States for the central division of the western district of Missouri, hereby certify that the writing hereto annexed is a true and complete transcript from the records and files in the matter of the Kansas City, Memphis and Mobile Railroad Company, bankrupt, in bankruptcy cause No. 971 of:

1. The adjudication of bankruptcy, made Feb'y 15, 1876.
2. The election of assignees, made March 15, 1876.
3. The approval of election of assignees and appointment of additional assignees.
4. The certified copy of deed of assignment of bankrupt's estate.
5. The petition of assignees for sale of road.
6. The order of sale of road, made March 5, 1877.
7. The report of sale of road-bed, &c.
8. The approval of sale of road-bed, &c., as fully as the same remain on file and of record in said case in this office.

184 In witness whereof I have hereunto subscribed my name and affixed the seal of said court, in the city of Jefferson, in said district, this 18th day of July, A. D. 1887.

[SEAL.] LOUIS SCHMIDT, *Clerk.*

Certified Copy of Deed from Assignees to John B. Bancroft.

Know all men by these presents, that whereas the Kansas City, Memphis and Mobile Railroad Company, a corporation organized under and by virtue of the laws of the State of Missouri held and owned on the 1st day of February, 1876, and at the dates hereinafter mentioned the franchises, rights of way, road-bed and appurtenances of and belonging thereto intended and pertaining to the construction operating and maintaining a railroad by name of the Kansas City, Memphis & Mobile railroad, and running from said city of Kansas, Jackson county, Missouri in the direction of Memphis Tennessee and Mobile Alabama through the State of Missouri and Arkansas, and

Whereas, on the fifteenth day of February 1876 said Kansas City, Memphis and Mobile Railroad Company was on the petition of its creditors by the United States district court for the western district of Missouri duly adjudicated a bankrupt, and whereas afterwards to wit, on the 15th day of March 1876, the undersigned Gardiner Lathrop and Henry Flanagan were at a meeting of the creditors of said bankrupt corporation held for that purpose elected and chosen assignees thereof and said election of said Lathrop and said Flanagan being reported and submitted to said United States district court for said western district of Missouri was by said court duly confirmed and approved and

185 Whereas on the seventeenth day of March, 1876, the undersigned Turner A. Gill was by said United States district court duly appointed an additional assignee and

Whereas, afterwards, to wit, on the thirtieth day of March, 1876, J. D. S. Cook register in bankruptcy in said western district of Missouri and who as such register had such bankrupt case in charge did by instrument in writing duly assign, transfer, and convey to said Lathrop, Flanagan and Gill assignees aforesaid and duly qualified as such all the right title, interest choses in action, franchises right of way road-bed and all property real and personal of every nature whatsoever then or at the filing of said petition in bankruptcy belonging to said bankrupt corporation the Kansas City, Memphis & Mobile Railroad Company, and

Whereas, afterwards, to wit, on the fifth day of March, 1877, the said United States district court for the western district of Missouri, on the petition of said assignees to proceed and advertise and sell at public auction to the highest bidder for cash the road-bed, masonry, rights of way and appurtenances belonging to said Kansas City, Memphis & Mobile Railroad Company and said court did in said order direct said sale to be free of all liens and incumbrances except all taxes due or to become due and that said sale be made subject to the approval of said court. Said court in said order also commissioned these assignees to sell said property at the court-house door in said Kansas City, and on the 11th day of April, 1877, first giving thirty days' notice thereof at least by advertisement in the Daily Journal of Commerce a newspaper printed in said Kansas

City and also in the Clinton Advocate a newspaper published in Clinton, Henry county, Missouri, and

186 Whereas on the 11th day of April, 1877, at the court-house door in said Kansas City, the said assignees having therefor given said notices as by the court ordered duly published and printed in said newspapers, did offer for sale at public auction for cash to the highest bidder the said road-bed, masonry, rights of way and appurtenances thereunto said railroad corporation belonging and at said public sale make known publicly the terms and conditions of said selling as aforesaid and at said sale John D. Bancroft of the city of Kansas, Jackson county, Missouri, was the highest bidder for said property and for the sum of fifteen thousand and twenty-five dollars ($15,025) and the said road-bed masonry rights of way and appurtenances of said railroad were struck off to said Bancroft at that sum, and

Whereas afterwards, to wit, on the 14th day of April, 1877, the said assignees did file their report of said sale in said United States district court for the western district of Missouri and thereupon said court having duly considered the same did on the 16th day of April, 1877, by its order duly entered of record*ed* in said cause in bankruptcy duly approve said sale to said Bancroft and said court did then and there further order the undersigned assignees on payment to them of said sum of fifteen thousand and twenty-five dollars the purchase price aforesaid to execute and deliver to said John D. Bancroft a deed to said property on the same terms and conditions as sold as hereinafter stated and whereas said John D. Bancroft has this day paid to these assignees the said sum of fifteen thousand and twenty-five dollars ($15,025.00) *and*

Now, therefore, in consideration of the premises and of the sum of fifteen thousand and twenty-five dollars to the undersigned assignees in hand paid by said John D. Bancroft the receipt

187 whereof is hereby acknowledged and in pursuance of the order of said United States district court for the western district of Missouri and by virtue of power and authority vested in the undersigned assignees of said Kansas City, Memphis and Mobile Railroad Company do hereby grant convey and confirm unto John D. Bancroft all the road-bed masonry rights of way and appurtenances of said Kansas City, Memphis and Mobile Railroad Company wherever situated free and clear of all liens and incumbrances save and except all taxes due and to become due on the same.

To have and to hold the same unto the said John D. Bancroft his heirs and assigns forever.

Witness our hands and seals hereto subscribed and affixed this 25th day of April, A. D. 1877.

TURNER A. GILL, [SEAL.]
HENRY FLANAGAN, [SEAL.]
GARDINER LATHROP, [SEAL.]
Assignees, &c.

STATE OF MISSOURI, }
County of Jackson, } ss:

Be it remembered that Gardiner Lathrop and Turner A. Gill, assignees of the Kansas City, Memphis and Mobile Railroad Company, bankrupt, who are personally known to the undersigned, a notary public within and for said Jackson county and State of Missouri, to be the same persons whose names are subscribed to the foregoing deed as parties thereto, this day personally appeared before me and acknowledged that they executed and delivered the same as their voluntary act and deed as such assignees for the uses and purposes therein contained; and I further certify that I was duly qualified a notary public on the 30th of July, 1873, and that my term expires June 25th, 1877.

188 Witness my hand and notarial seal this 26th day of April, A. D. 1877.

[SEAL.] HOMER REED,
Notary Public.

STATE OF MISSOURI, }
County of Cole, } ss:

Be it remembered that Henry Flanagan, one of the assignees of the Kansas City, Memphis & Mobile Railroad Company, bankrupt, who *are* personally known to the undersigned, a notary public within and for the county of Cole & State of Missouri, to be the same person whose name is subscribed to the foregoing deed as a party thereto, this day personally appeared before me and acknowledged that he executed and delivered the same as his voluntary act and deed as assignees aforesaid for the uses and purposes therein mentioned.

Witness my hand and seal this 25th day of April, 1877.
Qualified April 23rd, 1877.
Commission expires April 19, 1881.

NICK E. MILLER, [SEAL.]
Notary Public, Cole County, Mo.

Filed for record and duly recorded in my office this 30th day of April, 1877, at 4.40 p. m.

CHAS. D. LUCAS, *Recorder*,
By J. WM. VINCENT, *D. R.*

STATE OF MISSOURI, }
County of Jackson, } ss:

I, R. T. Hinde, recorder of deeds within and for the county of Jackson aforesaid, do hereby certify that the above and foregoing is a full, true, and complete copy of the assignees' deed, with the proper acknowledgment and note of record thereon, from Turner A. Gill *et al.*, assignees of the Kansas City, Memphis & Mobile Railroad Co., to John D. Bancroft, as the same appears of record in my

189 office in Book —, series B 27, page 63 and following.

In testimony whereof I hereunto set my hand and affix the

seal of said office, at Kansas City, Mo., this 8th day of July, A. D. 1877.

[SEAL.] R. T. HINDE, *Recorder*,
By JOHN A. McCOY, *Deputy*.

(*Certified Copy of Deed from John D. Bancroft & Wf. to T. K. Hanna et al., Trustees.*)

We, the undersigned, being the same persons and firms mentioned in the following deed of trust, consent and agree to the terms and provisions of this deed and direct the said John D. Bancroft to sign and deliver the same this the 27th April, A. D. 1877:

BENJAMIN McLEAN.
TOOTLE, HANNA & CO.
JOHN D. BANCROFT.
J. M. WOOD.
E. L. MARTIN & CO.
GATES & KENDALL.
WARRINER, GREGORY & CO.
SMITH & KEATING.
D. M. JARBOE & CO.
M. DIVELEY & CO.
VAUGHAN & CO.
A. J. GILLESPIE.
C. E. ROBINSON.
A. M. ALLEN.
THOMAS McNAMARA.
JOHN C. GAGE.
BULLENE, MOORE & EMERYS.
TRUMBULL, REYNOLDS & ALLEN.
FRANCIS FOSTER.
HOWARD M. HOLDEN.
PLANKINGTON & ARMOUR.
SLAVENS, MANSUR & CO.
LEWIS HAMMERSLOUGH.
EDWARD H. ALLEN.
WM. HOLMES.

Whereas, on the eleventh day of April A. D. 1877 John D. Bancroft of the city of Kansas county of Jackson and State of Missouri at a sale on that day made by Turner A. Gill, Henry
190 Flanagan and Gardiner Lathrop, assignees in bankruptcy of the Kansas City, Memphis and Mobile Railroad Company at the court-house door in the city of Kansas county of Jackson and State of Missouri became the purchaser of all the road-bed, masonry, rights of way, and appurtenances of the said Kansas City, Memphis and Mobile Railroad Company wherever situated as will more fully appear by the deed of said assignees to said John D. Bancroft dated the 25th of April, 1877, reference thereto being had and hereby being made at the price and sum of fifteen thousand and twenty-five dollars and for the purpose of purchasing said

property the following-named persons firms and associations contribute thereto the following sums of money that is to say:

Michael Dively and Company	500.00 dollars
Howard M. Holden	500.00 dollars
Benjamin McLean	500.00 dollars
C. E. Robinson	500.00 dollars
Tootle, Hanna and Company	500.00 dollars
E. L. Martin and Company	500.00 dollars
Warriner, Gregory and Company	500.00 dollars
Trumbull, Reynolds & Allen	500.00 dollars
Thomas McNamara	300.00 dollars
J. C. Gage	300.00 dollars
William Holmes	300.00 dollars
L. Hammerslough	300.00 dollars
Gates and Kendall	300.00 dollars
A. M. Allen	300.00 dollars
Francis Foster	200.00 dollars
John D. Bancroft	1,000.00 dollars
Edward H. Allen	1,000.00 dollars
Bullene, Moore & Emerys	1,000.00 dollars
Plankington and Armour	1,000.00 dollars
191 A. J. Gillespie	1,000.00 dollars
James W. Wood	1,000.00 dollars
Smith & Keating	1,000.00 dollars
Slavin, Mansur and Company	1,000.00 dollars
Vaughan and Company	1,000.00 dollars
D. M. Jarboe and Company	300.00 dollars

Now, therefore, know all men by these presents that I the said John D. Bancroft in consideration of the premises and at the request of the said parties so contributing said moneys as evidenced by their signatures to the paper hereto attached and made part hereof have sold bargained and conveyed and do by these presents sell bargain convey and confirm to Thomas K. Hanna, Benjamin McLean and John D. Bancroft all of the road-bed, masonry rights of way and appurtenances of the said Kansas City, Memphis and Mobile Railroad Company so as aforesaid acquired by me hereby intending to convey all the right title and interest property and estate of every kind and nature that I have or may acquire or succeed to by virtue of said assignees' deed wheresoever situate.

To stand seized and to have and to hold the same unto the said Thomas K. Hanna, Benjamin McLean and John D. Bancroft in joint tenancy and to hold the survivor and survivors of them and their successor or successors and assigns forever.

In trust however, for the following purposes: That the said trustees the survivor or survivors of them and their successor or successors in this trust shall manage and use said property for the purposes and in the manner and shall also sell assign transfer and convey the same to such person or persons association or corporation for the price and on the terms the *the* persons and firms fur-

nishing two-thirds of the money aforesaid may from time to time direct and the proceeds if any arising from such man-
192 agement use sale or transfer shall be divided among the persons and firms aforesaid in proportion to the amount or amounts so furnished by them and in directing the management use sale transfer and conveyance of said property and in the participation of the proceeds thereof the assignee or assignees of any such persons or firms so furnishing said money shall possess the same rights and be subject to the same liabilities that the person or firms so furnishing said money would have had or be liable so that those representing two-thirds of the amount furnished aforesaid shall at all times have the right to direct the management use sale transfer and conveyance of said property and of any and every part thereof. In case or so often as one or more of the trustees here or hereafter appointed shall die the title by such trustee held shall at once vest in the surviving trustees or trustee and the persons and firms and their assignees furnishing two-thirds of the money aforesaid may at any time select a trustee or trustees to fill any vacancy and the surviving trustees or trustee shall thereupon make to such new trustee or trustees the necessary and proper conveyance or conveyances to vest the title to said property in the new trustee or trustees jointly with survivors or survivor and in like manner the persons and firms and their assignees furnishing two-thirds of the moneys aforesaid may at any time select new trustees to act instead of those now or hereafter appointed and upon such selection being made and declared in writing it shall be the duty of the then trustees or the survivor or survivors of them to make to said new trustee a deed of all of said property and rights and thereupon the trustees or trustee so conveying the same shall cease to be or act as trustees.

193 In testimony whereof, I the said John D. Bancroft have hereto subscribed my name and affixed my seal this the 27th day of April A. D. 1877.

JOHN D. BANCROFT. [SEAL.]
CORNELIA F. BANCROFT. [SEAL.]

STATE OF MISSOURI, }
County of Jackson, } *ss:*

Be it remembered that John D. Bancroft and Cornelia F. Bancroft, his wife, who are personally known to the undersigned, a notary public within and for said county and State, duly qualified as such on the 28th day of January, A. D. 1875, and whose term of office expires on the 18th day of January, A. D. 1879, to be the persons whose names are subscribed to the foregoing deed as parties thereto, this day appeared before me and acknowledged that they executed and delivered the same as their voluntary act and deed for the uses and purposes therein contained; and the said Cornelia

F. Bancroft, being by me made acquainted with the contents of said deed, acknowledged on an examination apart from her said husband that she executed the same and relinquishes her dower in the real estate therein mentioned freely and without compulsion or undue influence of her said husband.

Given under my hand and notarial seal this 27th day of April, A. D. 1877.

[L. S.] L. E. PRINDLE,
Notary Public for Jackson County, State of Missouri.

STATE OF MISSOURI, } ss:
County of Jackson, }

I, R. T. Hinde, recorder of deeds within and for the county of Jackson aforesaid, do hereby certify that the above and fore-
194 going is a full, true, and complete copy of the deed, with the proper acknowledgment and note of record thereon, from John D. Bancroft & wife to Thomas K. Hanna *et al.* as the same appears of record in my office in Book Series B 27, page 59, and following.

In testimony whereof I hereunto set my hand and affix the seal of said office, at Kansas City, Mo., this 8th day of July, A. D. 1887.

R. T. HINDE, *Recorder,*
By JOHN A. McCOY, *Deputy.*

(*Certified Copy of the Deed from T. K. Hanna et al., Trustees, to Jas. I. Brooks.*)

Whereas the Kansas City, Memphis and Mobile railroad with all its road-bed, rights of way, appurtenances and property and rights of property whatever connected with said railroad, with all the franchises of the Kansas City, Memphis & Mobile Railroad Company were by deed dated April 27th, A. D. 1877 and recorded in the recorder's office for Jackson county, Missouri at Kansas City April 30th A. D. 1877 in Book B 27 on pages 59, 60, 61, & 62 thereof, conveyed to the undersigned Thomas K. Hanna, Benjamin McLean and John D. Bancroft as trustees and whereas the present owners of more than two-thirds of the moneys and shares furnished by the persons and firms named in said deed for the purchase of said property have directed said undersigned trustees as provided in said deed to sell said property to James I. Brooks on the terms and conditions herein named for the sum of nineteen thousand one hundred and fifty-six and $\frac{87}{100}$ dollars, now therefore,

Know all men by these presents, that we the said trustees party of the first part for and in consideration of said sum to us in hand
195 paid by said James I. Brooks party of the second part, the receipt of which is hereby acknowledged, have this day remised released, conveyed transferred and forever quitclaimed

to said party of the second part said railroad, rights of way, road-bed appurtenances, property rights of property and franchises.

To have and to hold the same unto him the said party of the second part and to his heirs and assigns forever, subject however to the following conditions, said party of the second part is to build said railroad from Kansas City to Harrisonville or Belton as said second party may elect on or before January 1st A. D. 1881, so as to be ready for use as a railroad, and also to build said railroad to the coal-fields of Bates county to a point south of Butler on or before July 1, 1881, so as to be ready for like use as aforesaid, and if said second party shall fail to build said railroad to said coal-fields as aforesaid, then the property hereby sold as aforesaid shall revert to said first party and reinvest in them the same as they now hold the same, provided, however, that as soon as said second party shall expend the sum of fifty thousand dollars in the construction of a road-bed for said railroad commencing at Kansas City and running southwardly then the said provision for a reversion of said property as aforesaid shall become null and void and of no effect whatever and upon said expenditure being made in the building of said railroad as aforesaid by said second party of said sum of fifty thousand dollars then said trustees are to execute to said second party or his assignees an instrument in writing acknowledging the waiver and extinguishment of said forfeiture. In the event of a disagreement between the said trustees and said second party, as to the expenditure in fact by said second party of said fifty thousand dol-
196 lars as aforesaid, as said second party may hereafter claim, then said trustees and said second party shall each select an arbitrator and they in case of a disagreement between them shall select a third arbitrator, and in case either party refuses to select an arbitrator, then the additional arbitrator chosen by the other party shall select two additional arbitrators and the arbitrators selected in any of the above-mentioned modes shall determine whether such expenditure has been made by said second party, and such determination of such arbitrators shall be binding on both parties and may be enforced by judgment as provided by the laws of this State, said party of the first part covenants and warrants to and with said second party that they the said trustees have not in anywise encumbered said property, and that the same is free from all encumbrances done or suffered by them.

Given under our hands and seals this 13th day of January, A. D. 1880.

THOMAS K. HANNA, [SEAL.]
BENJAMIN McLEAN, [SEAL.]
JOHN D. BANCROFT, [SEAL.]
Trustees.

STATE OF MISSOURI, }
County of Buchanan, } ss:

Be it remembered that on this 14th day of January, A. D. 1880, before the undersigned, a notary public within and for the county of Buchanan aforesaid, personally came Thomas K. Hanna, one of the trustees mentioned in the within and foregoing instrument of writing, and who is personally known to me to be the same person whose name is subscribed to the within and foregoing instrument of writing as a party thereto, and acknowledged the same to be his act and deed for himself and as such trustee and to be the act and deed of his beneficiaries for the purposes in said instrument
197 of writing mentioned.

In testimony whereof I have hereunto set my hand and affixed my official notarial seal, at my office, in St. Joseph, the day and year first above written, and I further certify that my notarial commission expires January 25th, 1883.

[SEAL.] JOHN F. TYLER,
Notary Public.

STATE OF MISSOURI, }
County of Jackson, } ss:

Be it remembered that Benjamin McLean and John D. Bancroft, who are personally known to the undersigned, a notary public within and for the county of Jackson aforesaid, to be the persons whose names are subscribed to the foregoing deed as parties thereto, this day appeared before me and acknowledged that they, for themselves as such trustees and for their said beneficiaries, executed and delivered the same as *their* voluntary act and deed of their said beneficiaries for the uses and purposes therein contained. My notarial commission expires February 18th, 1883.

In testimony whereof I have hereunto set my hand and affixed my official notarial seal, at my office, in Kansas City, this 13th day of January, A. D. 1880.

[SEAL.] DAN. B. HOLMES,
Notary Public.

We, the undersigned, being more than two-thirds in amount of the purchasers of the road-bed, right of way, masonry, and other property formerly belonging to the Kansas City, Memphis and Mobile Railroad Company, conveyed by John D. Bancroft to Thomas K. Hanna, Benjamin McLean, and John D. Bancroft, trustees, by deed dated April 27th, 1877, and duly recorded, and assignees of said purchasers, do hereby, in accordance with the provisions of said deed, order and direct said trustees to execute and de-
198 liver to James I. Brooks, of Boston, Massachusetts, a deed of said property, conveying the same to said Brooks upon the payment to them by said Brooks of nineteen thousand one hundred

and fifty-six $\frac{87}{100}$ dollars, such deed to be the same whereto this is annexed or similar in substance.

Witness our hands this January 13th, 1880.

$500	JOHN C. GAGE.
500	E. L. MARTIN & CO.
1,000	J. W. WOOD.
500	BENJAMIN McLEAN.
500	HOWARD M. HOLDEN.
1,000	HOWARD M. HOLDEN, *Assignee of Edward H. Allen.*
500	HOWARD M. HOLDEN, *Assignee of C. E. Robinson.*
300	HOWARD M. HOLDEN, *Assignee of D. M. Jarboe & Co.*
1,000	HOWARD M. HOLDEN, *Assignee of John D. Bancroft.*
1,000	HOWARD M. HOLDEN, *Assignee of Slavens, Mansur & Co.*
300	LOUIS HAMMERSLOUGH.
500	WARRINER, GREGORY & CO.
300	GATES & KENDALL.
1,000	BULLENE, MOORE & EMERY.
200	FRANCIS FOSTER
500	MICHAEL DIVELY.
1,000	PLANKINGTON & ARMOUR.
1,000	SMITH & KEATING.
500	TRUMBULL, REYNOLDS & ALLEN.
300	WILLIAM HOLMES.
300	A. M. ALLEN.
500	TOOTLE, HANNA & CO.

Filed for record and duly recorded in my office on the 18th day of January, 1880, at 12.10 p. m.

CHAS. D. LUCAS, *Recorder*,
By W. H. WINSHIP, *D. R.*

199 STATE OF MISSOURI,)
County of Jackson,) *ss:*

I, R. T. Hinde, recorder of deeds within and for the county of Jackson aforesaid, do hereby certify that the above and foregoing is a full, true, and complete copy of the deed, with the proper acknowledgment and note of record thereon, from Thos. K. Hanna to James I. Brooks as the same appears of record in my office in Book Series V 38, page 384 and following.

In testimony whereof I hereunto set my hand and affix the seal of said office, at Kansas City, Mo., this 8th day of July, 1887.

[SEAL.]

R. T. HINDE, *Recorder*,
By JOHN A. McCOY, *Deputy.*

(*Certified Copy of Deed from James I. Brooks to K. C. & S. Construction Company.*)

Whereas Thomas K. Hanna, Benjamin McLean and John D. Bancroft by deed executed January 13th, A. D. 1880, conveyed to James I. Brooks certain property formerly belonging to the Kansas City, Memphis and Mobile Railroad Company and which property, by certain reserve conveyances had vested or was supposed to have vested in said Hanna, McLean and Bancroft and whereas the consideration paid for said property was paid by said Brooks from funds in his hands for that purpose but furnished by sundry persons who are or will be stockholders in the Kansas City and Southern Construction Company and the said property was conveyed to said Brooks for the benefit of said company when the same should be organized and whereas said company has been legally organized and is capable in law of purchasing and holding real estate,

Now, therefore, know all men by these presents, that I the
200 said James I. Brooks of the city of Boston and State of Massachusetts, do hereby make known admit and de/care that the property conveyed to me by said deed of January 13th A. D. 1880, was conveyed to me and that I now hold and will continue to hold the same in trust only for the benefit of the Kansas City and Southern Construction Company and I do for myself my heirs, executors and administrator- covenant and agree to and with the said Kansas City and Southern Construction Company their successors and assigns that I or my heirs shall and will convey the said premises by a good and sufficient quitclaim deed to the said Kansas City and Southern Construction Company or their assigns as they may direct and require and that I or my heirs shall not do or know/ingly suffer or permit any act deed matter or thing whereby said premises can shall or may be in anywise impaired injured or incumbered in title interest charge estate or otherwise however.

JAMES I. BROOKS. [SEAL.]

Signed, sealed, and delivered in presence of—the words "quitclaim deed," on page 2nd, 5 line, interlined before execution—

CHARLES NETTLETON.
CHAS. EDGAR MILLS.

STATE OF NEW YORK, } ss:
City and County of New York, }

I, Charles Nettleton, a commissioner for Missouri in New York, do hereby certify that on this 27th day of February, A. D. 1880, personally came before me James I. Brooks, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as party thereto, who acknowledges the same to be his free act and deed for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed
201 my *of* official seal this 27th day of February, A. D. 1880.
[L. S.] CHARLES NETTLETON,
Commissioner for Missouri in New York,
117 *Broadway, N. Y. City.*

Filed for record and duly recorded in my office this 3rd day of March, A. D. 1880, at 10 o'clock a. m.
CHAS. D. LUCAS, *Recorder,*
By E. F. HEDGES, *D. R.*

STATE OF MISSOURI, } *ss:*
County of Jackson, }

I, R. T. Hinde, recorder of deeds within and for the county of Jackson aforesaid, do hereby certify that the above and foregoing is a true, full, and complete copy of the deed, with the proper acknowledgment and note of record thereon, from James I. Brooks to the Kansas City and Southern Construction Company as the same appears in my office in Book B, series B 45, page 74 and following.

In testimony whereof I hereunto set my hand and affix the seal of said office, at Kansas City, Mo., this 8th day of July, A. D. 1887.
[SEAL.] R. T. HINDE, *Recorder,*
By JOHN A. McCOY, *Deputy.*

202 *Certified Copy of Deed from James I. Brooks to K. C. & S. Construction Company.*

Whereas by deed executed and acknowledged by James I. Brooks of Boston Massachusetts on the 27th day of February A. D. 1880, and recorded March 3rd A. D. 1880, in the office of the recorder of deeds of Jackson county Missouri at Kansas City in Book # 45 at page 74 it was declared that said James I. Brooks held the property hereinafter described in trust only for the benefit of the Kansas City and Southern Construction Company and whereas by said deed said James I. Brooks did covenant and agree to and with the said Kansas City and Southern Construction Company that he the said James I. Brooks would convey said property by a good and sufficient quitclaim deed to the said Kansas City and Southern Construction Company as said company might direct, and require, and whereas, said Kansas City and Southern Construction Company has directed such quitclaim deed by the said James I. Brooks, now to be made.

Now therefore, know all men by these presents, that I James I. Brooks party of the first part for and in consideration of the said covenant and agreement and of the trusts recited and declared in said deed executed and acknowledged February 27th 1880, and of the sum of one dollar to the said James I. Brooks in hand paid by the said Kansas City and Southern Construction Company party of the second part the receipt of which is hereby acknowledged do by these presents sell alien bargain transfer convey and quitclaim unto the said party of the second part the following-described property,

viz: The Kansas City, Memphis and Mobile railroad running from Kansas City Jackson county and State of Missouri in the direction of Memphis in the State of Tennessee, and Mobile in the State
203 of Alabama, through the States of Missouri and Arkansas together with all and singular the rights of way road-bed, masonry property rights of property and appurtenances whatsoever or wheresoever situated of and belonging or in anywise appertaining to said railroad together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company.

To have and to hold said property unto said party of the second part and to its assigns forever.

In witness whereof I have hereunto set my hand and seal this first day of April, 1880.

JAMES I. BROOKS. [SEAL.]

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that this first day of April, A. D. 1880, appeared before me James I. Brooks, who is personally known to me, a notary public within and for said county, to be the same person whose name is subscribed to the foregoing deed as party thereto, and acknowledged that he executed and delivered the same as his voluntary act and deed for the uses and purposes therein contained.

In testimony whereof I have hereunto set my hand and affixed my notarial seal.

Done at office, in New York city and State, this 1st day of April, 1880.

CHARLES EDGAR MILLS,
[SEAL.] *Notary Public.*

Filed for record and duly recorded in my office on this 5th day of April, 1880, at 12.30 p. m.

C. D. LUCAS, *Recorder,*
By E. F. HEDGES, *D. R.*

STATE OF MISSOURI, } ss:
County of Jackson, }

204 I, R. T. Hinde, recorder of deeds within and for the county of Jackson aforesaid, do hereby certify that the above and foregoing is a full, true, and complete copy of the deed, with the proper acknowledgment and note of record thereon, from James I. Brooks to Kansas City and Southern Construction Company as the same appears of record in my office in Book Series B 45, page 271 and following.

In testimony whereof I hereunto set my hand and affix the seal of said office, at Kansas City, Mo., this 21st day of July, A. D. 1887.

[SEAL.] R. T. HINDE, *Recorder,*
By JOHN A. McCOY, *Deputy.*

STATE OF MISSOURI, *ss:*

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of a resolution of the directors of the Kansas City & Southern Railway Company extending the line of its road from Clinton, Henry county, to Osceola, St. Clair county, filed December 23rd, 1880, as the same appears on file and of record, as the law directs, in this office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri.

Done at office, in the city of Jefferson, this twenty-fourth day of December, A. D. eighteen hundred and eighty-four.

[SEAL.] MICH'L K. McGRATH,
Secretary of State.

205 At a meeting of the board of directors of the Kansas City and Southern Railway Company held at Kansas City, Missouri, on the twentieth day of December, A. D. 1880, there were present the following members of said board, being more than two-thirds of said board of directors, to wit: Joseph E. Young, E. L. Martin, William J. Campbell, Joel H. Nash, and John Sidle.

Thereupon, on motion of Joseph E. Young, the following resolutions were unanimously adopted by the vote of all of said directors present at this meeting:

Resolved, That the line of railroad to be built by this company as located by the articles of association be, and the same is hereby, extended from the city of Clinton, in Henry county, Missouri, southwardly through said county of Henry and through the county of St. Clair, in said State of Missouri, to the city of Osceola, in said last-named county.

Resolved, That the proceedings of this meeting be entered at large on the records of this company and that a copy thereof be filed with the secretary of state of the State of Missouri.

STATE OF MISSOURI, }
County of Jackson, } *ss:*

Be it remembered that on this twentieth day of December, A. D. 1880, before the undersigned, a notary public within and for said county, personally came Joseph E. Young, Joel H. Nash, and John Sidle, who, being by me first duly sworn according to law, on their oath state:

206 I. That they, Joseph E. Young, Joel H. Nash, and John Sidle, are directors of the Kansas City and Southern Railway Company.

II. That the foregoing is a true copy of the proceedings of the board of directors of said company adopted at a meeting thereof held December 20th, 1880, at Kansas City, Missouri, and extending, as appears therefrom, the line of railroad of said company from the city of Clinton, Henry county, Missouri, to the city of Osceola, St. Clair county, Missouri.

III. That the sum of five hundred thousand dollars has in good faith been subscribed to the capital stock of said railroad company; that five per centum thereof, to wit, the sum of twenty-five thousand dollars, has been paid in cash to the directors of said company, and that the amount of the capital stock so subscribed and paid exceeds the amount per mile, including said extension from said city of Clinton to said city of Osceola, which by section 766 of the Revised Statutes of Missouri is required to be subscribed and paid for before filing the original articles of said company.

IV. That it is intended in good faith to construct the standard-gauge road over the line so extended to said city of Osceola, as mentioned in said proceedings.

JOSEPH E. YOUNG.
JOEL H. NASH.
JOHN SIDLE.

Subscribed and sworn to before me this 20 day of December, A. D. 1880.

In witness whereof I have hereunto set my hand and affixed my notarial seal.

[SEAL.] Done at office, in Kansas City, Mo., this December 20th, A. D. 1880.

My commission expires Jan'y 13th, 1880.

ED. L. SCARRITT,
Notary Public.

207 Filed December 23rd, 1880.

MICH'L K. McGRATH,
Secretary of State.

STATE OF MISSOURI, *ss:*

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of a resolution of the directors of the Kansas City and Southern Railway Company extending the line of its road from Osceola, St. Clair county, to State line in Howell county, filed April 11, 1882, as the same appears on file and of record, as the law directs, in this office.

[SEAL.] In witness whereof I have hereunto set my hand and affixed the great seal of the State of Missouri. Done at office, in the city of Jefferson, this twenty-fourth day of December, A. D. eighteen hundred and eighty-four.

MICH'L K. McGRATH,
Secretary of State.

At a meeting of the board of directors of the Kansas City and Southern Railway Company held at its office in Kansas City, Missouri, October 14th, A. D. 1881, more than two-thirds of the directors being present, the following resolution was unanimously passed and adopted, to wit:

Resolved, That the line of railroad of this company be, and the same is hereby, extended from the town of Osceola, Missouri, its

present terminus, through the counties of St. Clair, Polk, Greene, Webster, Wright, Douglas, Ozark, and Howell, in the State of Missouri, in a general southeasterly direction, as the same may
208 hereafter be marked, located, and surveyed, to such point in said county of Howell and on the State line between the States of Missouri and Arkansas as will connect the terminus of the road of this company with the northern terminus of the road of the Iron Mountain and Helena Railroad Company.

I certify that the foregoing is a true and correct copy of a resolution adopted by the unanimous vote of the board of directors of the Kansas City and Southern Railroad Company at a meeting thereof held as aforesaid, and that there were present and voting five of the seven directors of said company.

WM. J. CAMPBELL, *President.*

STATE OF MISSOURI,)
County of Jackson,) *ss:*

J. H. Nash, George H. Briggs, and E. L. Martin, being duly sworn, state on their oaths that they are directors of the Kansas City and Southern Railway Company; that at a meeting of the directors of said company held at the city of Kansas City, in said county, October 14th, A. D. 1881, at which meeting there were present five of the seven directors of said company, the resolution of which the foregoing is a true and correct copy was unanimously agreed to and adopted and spread upon the records of the company, and that at and before the adoption of said resolution as aforesaid there had been and is subscribed and secured to the capital stock of said company more than the sum of one thousand dollars per mile for the entire distance covered by the line over and upon which by said resolution of said board of directors the railr-ad of said company is extended, and that more than five per centum has been paid thereon to the said directors in good faith to construct, maintain, and operate t-e said railroad over and upon the line designated in said resolution.

209

J. H. NASH.
GEO. H. BRIGGS.
E. L. MARTIN.

Sworn to and subscribed before me this October 14th, A. D. 1881.
[SEAL.] W. L. STOCKING,
Notary Public.

My commission expires Nov. 6th, 1882.
Filed April 11, 1882.

MICHAEL K. McGRATH,
Secretary of State.

Certified Copy of Certificate of Organization of the Kansas City and Southern Construction Company.

STATE OF CONNECTICUT,
OFFICE OF SECRETARY OF STATE.

The Kansas City and Southern Construction Company.

Certificate of Organization.

To all persons to whom these presents shall come:

The undersigned, being the president and a majority of the directors of "The Kansas City and Southern Construction Company," a corporation organized under the statute laws of the State of Connecticut regulating the formation of joint stock corporations and located in the town of Enfield, county of Hartford, in said State, in pursuance of said statute laws hereby certify as follows, to wit:

1st. The purpose for which said corporation is formed are the following, to wit:

To purchase and sell railroad stocks, railroad bonds, and other securities and to make advances in money and credit to railroad and other improvement, mining, and manufacturing compa-
210 nies, and to enter into contract for the construction of railroads and of all kind of public works, and also to aid contractors, miners, and manufacturers, and to endorse and guarantee the payment of the bonds and the performance of the obligations of individuals, companies, and corporations, and to buy, sell, own, and deal in any real or personal property necessary or convenient for the prosecution of said business and generally to do all things incidental to said business and to the proper management thereof.

2nd. The amount of their capital stock is two hundred and fifty thousand dollars.

3rd. The amount of their capital stock actually paid in is twenty thousand dollars.

4th. The names and residences of their stockholders and the number of shares by each respectively owned is as follows, to wit:

Names of stockholders.	*Residence.*	*No. of shares.*
James I. Brooks	Boston, Mass., eleven hundred and seventy-five shares	1,175
Amos Tenney	New York, eleven hundred and five shares	1,105
George B. Ripley	Southfield, N. Y., two hundred shares	200
Sutherland Tenney	New York, ten shares	10
Samuel Hathaway	Enfield, ten shares	10

And in further pursuance of said statute laws we cause this certificate to be deposited with the secretary of this State and a duplicate thereof with the town clerk of the town of Enfield, in which said corporation is to transact its business.

Dated at Enfield this sixteenth day of February, A. D. 1880.

211 AMOS TENNEY, *President.*
AMOS TENNEY,
JAMES I. BROOKS,
GEO. B. RIPLEY,
Directors.

STATE OF NEW YORK, }
City and County of New York, } ss:

NEW YORK CITY, *Feb'y* 16, 1880.

Then and there personally appeared Amos Tenney, being the president, and James I. Brooks, George B. Ripley, and said Amos Tenney, being a majority of the directors of the Kansas City and Southern Construction Company, and made oath to the truth of the foregoing certificate signed by them before me.

In witness whereof I have hereunto set my hand and affixed my official seal this 16th day of February, A. D. 1880.

[SEAL.] CHARLES EDGAR MILLS,
Commissioner for Connecticut in New York,
117 *Broadway, N. Y. City.*

Rec'd & filed Feb'y 21, 1880.

STATE OF CONNECTICUT, }
Office of Secretary of State, } ss:

I, Charles A. Russell, secretary of the State of Connecticut and keeper of the seal thereof, do hereby certify that I have compared the annexed copy of the certificate of organization of the Kansas City and Southern Construction Company with the original certificate of organization now on file and a matter of record in this office and find the said copy to be an exact transcript of said original certificate.

In testimony whereof I have hereunto set my hand and
212 affixed the seal of said State, at Hartford, this 14th day of October, 1885.

[SEAL.] CHARLES A. RUSSELL,
Secretary of State.

STATE OF CONNECTICUT,
OFFICE OF SECRETARY OF STATE.

Extract from General Statutes of Connecticut, being section 23 of chapter XI, title 19, page 439.

A copy certified by the secretary of this State under its seal of the original certificate of organization of any joint stock corporation shall be *prima facie* evidence of the due formation, existence, and capacity of such corporation.

STATE OF CONNECTICUT, }
Office of Secretary of State, } ss:

I, Charles A. Russell, secretary of the said State of Connecticut and keeper of the seal thereof, do hereby certify that the foregoing is an extract from the General Statutes of said State, covering the law of evidence of the due formation and existence of joint stock corporations.

In testimony whereof I have hereunto set my hand and affixed the seal of said State, at Hartford, this 14th day of October, 1885.

[SEAL.] CHARLES A. RUSSELL,
Secretary of State.

213 The petition in said case 474 is as follows:

BERTHOLD SCHLESINGER, SEBASTIAN B. SCHLESINGER }
vs.
KANSAS CITY & SOUTHERN CONSTRUCTION COMPANY. }

Plaintiffs state that they are partners in business under the firm name of Naylor & Co.; that defendant is a corporation duly created and existing under and by virtue of the laws of the State of Connecticut and is a non-resident of the State of Missouri; that on the second of March, 1880, defendant entered into a contract with plaintiffs for the purchase of five thousand tons of English or German steel rails at the price of fifty-one dollars in bond per ton of twenty-two hundred & forty pounds delivered in New York; that said contract is herewith filed and made a part hereof; that by the terms of said contract it was provided that ten to fifteen thousand dollars were to be paid within twenty-four hours after purchase of rails and within a week or ten days after same time enough more to make up twenty-five thousand dollars as a margin, and ten per cent. margin was to be kept good in case of a decline in the market price of steel rails; that the remainder of the purchase-money was to be paid in cash on arrival.

Plaintiffs say that after the execution of said contract they began to purchase and send forward the rails from Europe for the use of defendant, and that at the time of the breach hereinafter mentioned and complained of there had arrived in New York under the contract 1,470 tons of rails; that prior to the time of the said breach defendant had paid to plaintiffs upon said contract the sum
214 of fifty thousand dollars; that on the — day of ——, A. D. 1880, the defendant notified plaintiffs that it would be unable to further carry out its contract with them and failed and refused thereafter to carry out or perform the same on its part, although demand upon it for that purpose was often made; that thereafter it directed the plaintiffs to sell the rails that had been received by them under the contract for its account and the rails which had been purchased but not received, making 5,000 tons in all; that said sale was accordingly made and the amount realized therefrom, after deducting brokerage, commissions, and duties, was $165,192.42; that this sum, together with the $50,000 paid upon the contract, amount to $215,192.12; that the contract price of the rails was $255,000; that by reason of the breach of said contract by the def't plaintiffs have been damaged in the sum of $39,807.88, with interest from the third day of Sept., 1880, the day the balance was struck and due and made for payment upon the defendant.

Wherefore plaintiffs pray judgment against the defendant for the

sum of $39,807.88, with six per cent. — thereon from the 3rd day of Sept. 1880, and costs.

CRAVENS & LATHROP & SMITH,
For Plaintiffs.

Said answer is as follows:

BERTHOLD SCHLESINGER *et al.*
against
KANSAS CITY & SOUTHERN CONSTRUCTION COMPANY.

Now comes the defendant and denies each and every allegation in plaintiffs' petition contained, and asks to be dismissed its with costs in this behalf sustained.

BOTSFORD & WILLIAMS,
For Defendant.

215 Afterwards, to wit, on Monday, February 2nd, A. D. 1885, the following entry was made in said cause, to wit:

BERTHOLD SCHLESINGER *et al.*
against
K. C. & SOUTHERN CONSTRUCTION CO. } 474.

This day comes the Kansas City & Southern Railway Company, by its attorneys, Messrs. Botsford & Williams, and file their interplea to plaintiffs' petition herein.

Said interplea is as follows:

UNITED STATES OF AMERICA,
Western District of Missouri,

In the United States Circuit Court, Western District of Missouri.

BARTHOLD SCHLESINGER and SEBASTIAN B. SCHLESINGER, Plaintiffs,
vs.
KANSAS CITY & SOUTHERN CONSTRUCTION COMPANY, Defendant.

Now comes the Kansas City & Southern Railway Co., a corporation duly organized under the laws of the State of Missouri, and with the permission of this honorable court and in compliance with section 449 of the Revised Statutes of Missouri of 1879 does herein file its interpleader in this case and states the following facts upon which to predicate such interplea:

1st. That it is and was long prior to the institution of this suit and the suing out of the attachment herein a corporation duly organized under the laws of the State of Missouri and is now the owner of and operating a line of railroad in this State and within the western district of Missouri aforesaid.

2nd. That the property attached in this case and which was levied on by the sheriffs of the different counties as the property
216 of the defendant in this cause is not susceptible of being seized under an execution or attachment, and therefore the pretended levies of said writs of attachment are null and void.

3rd. The said property so levied on by the sheriffs of the different counties is described as previous, to wit, by the sheriff of Jackson county, Missouri, as "the Kansas City, Memphis & Mobile railroad, running from Kansas City, Jackson county and State of Missouri, in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, through the States of Missouri and Arkansas, together with all and singular the rights of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever or wheresoever situated, of and belonging or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company, being the same property being conveyed by the Kansas City and Southern Construction Company to the Kansas City and Southern Construction Railroad Company by deed dated the 24th day of May, A. D. 1880, and recorded in the recorder's office within and for the county of Jackson and State of Missouri in Book #B 45, at page 606 and 607, by the sheriff of Cass county, Missouri, as "the Kansas City, Memphis & Mobile railroad, running from Kansas City, Jackson county and State of Missouri, in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, through the States of Missouri and Arkansas, together with all and singular the right of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever and wheresoever situated, of and belonging to said railroad, together with all the franchises of the Kansas City, Memphis & Mobile Railroad Company," and by the sheriff of Henry county, Missouri, as "the Kansas City, Memphis & Mobile railroad, running from Kansas City, Jackson county, Missouri,
217 in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, through the States of Missouri and Arkansas, together with all and singular the right of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever or wheresoever situated of and belonging or in anywise appertaining to said railroad, together with the franchises of the Kansas City, Memphis and Mobile Railroad Company, being the same property conveyed by the Kansas City and Southern Construction Company to the Kansas City & Southern Railroad Company" and by the sheriff of St. Clair county, Missouri, as the Kansas City, Memphis and Mobile railroad, running from Kansas City, Jackson county and State of Missouri, in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, through the States of Missouri and Arkansas, together with all and singular the right of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever or wheresoever situate of and belonging or in anywise appertaining to said railroad, together with the franchises of the Kansas City, Memphis & Mobile Railroad Company, being the same property conveyed by the Kansas City & Southern Construction Company by deed dated on the 24th day of May, A. D. 1880.

4th. This claimant, interpleader herein, was, long prior to the institution of this suit, to wit, the 17th day of October, 1881, and at the time of the institution of this suit, and now is the sole and ex-

clusive owner of all the property heretofore mentioned and described and which was attempted to be levied on under and by virtue of the several writs of attachment as aforesaid.

Wherefore this interpleader prays your honorable court to decree that said property is the property of the interpleader herein, and for such other and further orders as may to this honorable
218 court seem meet and just in the premises.

KANSAS CITY & SOUTHERN RAILWAY CO.,
By WILLIAM BAILEY, *President.*

WESTERN DISTRICT OF MISSOURI, *sct:*

William Bailey, being duly sworn, says he is president of the Kansas City & Southern Railway Company; that he has read the foregoing interplea and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; and further affiant saith not.

WILLIAM BAILEY.

Subscribed and sworn to before me this 31st day of January, A. D. 1885.

[SEAL.] WARREN WATSON,
Comm'r U. S. Circuit C't, West. Dist. of Mo.

And on Saturday, the 4th day of April, A. D. 1885, the following entry was made of record:

BERTHOLD SCHLESINGER *et al.*
against
KANSAS CITY & SOUTHERN CONSTRUCTION CO.

This day come complainants, by their attorneys, and file answer to the interplea of the Kansas City and Southern Railway Company. Said answer is in words and figures as follows:

219 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Plaintiffs,
vs.
KANSAS CITY & SOUTHERN CONSTRUCTION COMPANY, Defendant.

The plaintiffs above named for answer to the interpleader heretofore filed herein by the Kansas City & Southern Railway Company deny the same and each and every allegation therein contained and pray judgment.

JEFF. BRUMBACK & GARDINER LATHROP,
Att'ys for Pl'ffs.

And afterwards, to wit, at the regular October term of said court and on Tuesday, October 20th, 1885, the following entry was made of record, to wit:

BARTHOLD SCHLESINGER *et al.*
against } 474.
KANSAS CITY & S. CONSTRUCTION CO.

This day come the plaintiffs, by Lathrop & Smith and Jefferson Brumback, their attorneys; the defendant, on April 11, 1882, having filed an answer and in that way having heretofore appeared to this action, fails to appear at the trial; and thereupon come a jury, to wit, James W. Ambrose, John A. Devinney, T. C. Jones, B. S. McClack, Jacob Taylor, Charles Hoefer, James D. McKnight, Joseph H. Mallory, William A. Crain, Jack Dye, Raleigh Morgan, and J. L. Pretty, who are duly empanneled and sworn to try the issues joined, and, having heard the pleadings and the testimony and the charge of the court, the jury retire to consider what verdict
220 they shall render in the premises, and after due consideration the jury returned into court the following verdict, to wit:

"We, the jury, find for the plaintiffs and assess their damages at forty-nine thousand four hundred and forty-eight dollars and eleven cents ($49,448.11).

"T. C. JONES, *Foreman.*"

It is therefore considered by the court that the plaintiffs, Barthold Schlesinger and Sebastian Schlesinger, recover of the said defendant, Kansas City and Southern Construction Company, the said sum of forty-nine thousand eight hundred and forty-eight dollars and eleven cents ($49,448.11) so found to be due, together with their costs herein expended, and have thereof execution, to be levied of the property and effects attached and other property of defendant, and that this judgment and all executions issued thereon hold not only the property attached, but the other property of defendant.

And afterwards, to wit, on Thursday, October 22nd, A. D. 1885, the following entry was made of record:

BARTHOLD SCHLESINGER *et al.*
against } 474.
K. C. & SOUTHERN CONSTRUCTION CO.

This day comes the defendant herein and the interpleader, The Kansas City & Southern Railroad Company, by their attorney, John O'Grady, Esq., and file motions to set aside the verdict and judgment and for a new trial in this case and affidavits in support of said motions.

And on Tuesday, November 10th, A. D. 1885, the following entry was made of record, to wit:

BARTHOLD SCHLESINGER *et al.*
ag'st } 474.
K. C. & S. CONSTRUCTION CO.

This day a stipulation of parties is filed as to the hearing
221 of the motion for a new trial heretofore filed in this cause.

And on Wednesday, January 6th, A. D. 1886, the following entry was made of record in said cause, to wit:

BARTHOLD SCHLESINGER *et al.*
against } 474.
K. C. & S. CONST. CO.

This day come the parties, by their attorneys—the plaintiffs by J. Brumback and the defendant by Messrs. John O'Grady, M. Kinealy, and L. C. Krauthoff—and the motion to set aside the judgment heretofore entered herein, being called for hearing, is argued by counsel and submitted to the court and taken under advisement.

And afterwards, to wit, on Monday, February 1st, A. D. 1886, the following further entry was made in said cause, to wit:

BARTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Plaintiffs,
against } 474.
THE KANSAS CITY & SOUTHERN CONSTRUCTION COMPANY, Defendant.

And now come the said plaintiffs, Barthold Schlesinger and Sebastian B. Schlesinger, by their attorneys, and freely here in court remit to said defendant, The Kansas City & Southern Construction Company, thirteen thousand five hundred and forty-six and $\frac{72}{100}$ dollars, parcel of the damages by the jury assessed and awarded to them by the judgment of the court, and pray judgment for the residue of said damages; on consideration of which it is by the court ordered that the judgment heretofore rendered in this cause
222 be set aside, and the court doth adjudge and consider that said plaintiffs recover of said defendant thirty-five thousand nine hundred and one & $\frac{39}{100}$ ($35,901.39) dollars, together with *his* costs and charges in this behalf expended, and that they have thereof execution, and that the judgment and execution thereon hold not only to the property attached heretofore in this case, but the other property of the defendant; but execution shall not issue, without special leave of court, until after final decree in chancery case No. 401, in the case of Barthold Schlesinger *et al. vs.* The Kansas City & Southern Railway Company *et al.*

Thereupon comes defendant, by its attorneys, and files motions in arrest of judgment and for a rehearing.

And on Tuesday, May 18th, A. D. 1886, the following entry was made of record:

BERTHOLD SCHLESINGER *et al.*
against
K. C. & SOUTHERN CONSTRUCTION CO. } 474.

Ordered that the motions for a rehearing and in arrest of judgment heretofore rendered herein be denied.

And on Monday, August 2nd, 1886, the following entry was made of record:

BERTHOLD SCHLESINGER *et al.*
against
K. C. & S. CONSTRUCTION CO. } 474.

Ordered that the motions in arrest of judgment and for a rehearing herein be denied.

223 In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER *et al.*
vs.
THE KANSAS CITY AND SOUTHERN RAILWAY CO. *et al.* }

Now come the plaintiffs herein and file the following additional documentary evidence to be used upon the trial of this cause on their behalf, to wit:

1. Certified copy of a certificate of the Clinton and Memphis branch of the Tebo and Neosho Railroad Company in the matter of the sale and conveyance of the Clinton and Memphis branch of the Tebo and Neosho Railroad Company to the Kansas City, Memphis and Mobile Railroad Company, filed November 16, 1871.

2. Certified copy of a certificate of the Kansas City, Memphis and Mobile Railroad Company in the matter of the purchase of the Clinton and Memphis branch of the Tebo and Neosho Railroad Company and the Clinton and Kansas City branch of the Tebo and Neosho Railroad Company, filed November 16, 1871.

3. Certified copy of resolution of board of directors of the Kansas City, Memphis and Mobile Railroad Company to extend road, filed September 17, 1872.

4. Certified copy of a certificate of the Clinton and Kansas City branch of the Tebo and Neosho Railroad Company in the sale and conveyance of the Clinton and Kansas City branch of the Tebo and Neosho Railroad Company to the Kansas City, Memphis and Mobile Railroad Company, filed November 16, 1871.

5. Certified copy of abstract of attachment in Jackson county, Missouri.

224 6. Certified copy of abstract of attachment in Cass county, Missouri.

7. Certified copy of abstract of attachment in St. Clair county, Missouri.

8. Certified copy of abstract of attachment in Henry county, Missouri.

JEFFERSON BRUMBACK,
GEO. W. McCRARY,
Solicitors for Complainants.

STATE OF MISSOURI, *ss*:

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of a certificate of the Clinton and Memphis branch of the Tebo and Neosho Railroad Company in the matter of the sale and conveyance of the Clinton and Memphis branch of the Tebo and Neosho Railroad Company to the Kansas City, Memphis and Mobile Railroad Company by the Tebo and Neosho Railroad Company, filed November 16, 1871, as the same appears on file and of record as the law directs in this office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri.

Done at office, in the city of Jefferson, this nineteenth day of September, eighteen hundred and eighty-seven.

[SEAL.] MICH'L K. McGRATH,
Secretary of State.

We, the undersigned, Dewitt C. Stone, chairman, and Robert C. McBeth, secretary *pro tempore*, of the construction committee of the Clinton and Memphis branch of the Tebo and Neosho railroad, the said committee being duly appointed and invested by the
225 board of directors of the Tebo and Neosho Railroad Company with all the rights and powers which the said company have and possess or may possess and exercise with reference to said branch railroad by resolution duly and unanimously adopted by the said board of directors and entered upon its records, do hereby certify that on the thirty-first day of August, A. D. eighteen hundred and seventy-one, the said Tebo and Neosho Railroad Company, by and through the said committee thereunto authorized and empowered as aforesaid, and being also thereunto authorized, directed, and instructed by the holders of all the capital stock subscribed to the said company in the name of and to aid in the construction of the said branch railroad, did sell, assign, and convey the said Clinton and Memphis branch of the Tebo and Neosho railroad, together with all and singular its property, real and personal, choses in action, rights, powers, and franchises, unto the Kansas City, Memphis and Mobile Railroad Company, and that a majority of the holders of the capital stock of said Tebo and Neosho Railroad Company, subscribed in the name of said branch railroad, did on the day aforesaid assent to and vote in favor of making such sale, assignment, and conveyance, and did thereafter assent thereto in writing, and did in writing approve, ratify, and confirm the said sale, transfer, assignment, and conveyance, and we do further certify that the action aforesaid of said committee of the said stockholders is entered at length upon the records, authorized and

directed by the said board of directors of the Tebo and Neosho Railroad Company to be kept by said committee.

In testimony whereof we have hereunto subscribed our names and affixed the seal of said branch road this 18th day of Oct., A. D. 1871.

226 [SEAL.] DEWITT C. STONE,
Chairman of the Committee of Construction of the Clinton & Memphis Branch of the Tebo & Neosho Railroad Co.
ROBERT C. McBETH,
Secretary Pro Tempore of Committee of Construction of Clinton & Memphis Branch of Tebo & Neosho Railroad Co.

Filed November 16, 1871.
EUGENE F. WEIGEL,
Secretary of State.

STATE OF MISSOURI, *ss:*

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of a certificate of the Kansas City, Memphis and Mobile Railroad Company in the matter of the purchase of the Clinton and Memphis branch of the Tebo and Neosho Railroad Company and the Clinton and Kansas City branch of the Tebo and Neosho Railroad Company, filed November 16, 1871, as the same appears of record and on file, as the law directs, in this office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri. Done at office, in the city of Jefferson, this nineteenth day of September, A. D. eighteen hundred and eighty-seven.

[SEAL.] MICH'L K. McGRATH,
Secretary of State.

227 The undersigned, president and secretary of the Kansas City, Memphis and Mobile Railroad Company, hereby certify that on the 31st day of August, A. D. 1871, the said railroad company did purchase the Clinton and Memphis branch of the Tebo and Neosho railroad, and that, all of the stockholders of the said Kansas City, Memphis and Mobile railroad being convened and represented by proxy at the town of Clinton, in Henry county, State of Missouri, on the day aforesaid, the said stockholders did sign a written consent on the record of said meeting to the transaction of the business proposed thereat, and that afterwards, on the day aforesaid, all the holders of the stock of said company in person and by proxy did assent to said purchase and ratify and approve the same, and afterwards, to wit, on the first day of September, 1871, a majority of the stockholders of said company did assent to the purchase of said branch railroad in writing, and that such written assent is entered upon the records of said company; and we do further certify that afterwards, on the day and year aforesaid, the said Kansas City, Memphis and Mobile Railroad Company did purchase the Clinton

and Kansas City branch of the Tebo and Neosho railroad, to which purchase all the stockholders of the said Kansas City, Memphis and Mobile Railroad Company have assented, in writing, and that said assent is entered upon the records of said company; and we do further certify that the holders of a majority of the stock in said branch railroad have assented, in writing, to the sale of said branch roads and each of them to the said Kansas City, Memphis and Mobile Railroad Company.

In witness whereof we have hereunto signed our respective names as such president and secretary and have hereunto affixed the seal of said corporation, at Clinton, this 18th day of October, A. D. 1871.

228 [SEAL.] DEWITT C. STONE,
President of the Kansas City, Memphis and Mobile Railroad Company.
WM. O. MEAD,
Secretary of the Kansas City, Memphis & Mobile Railroad Company.

Filed November 16, 1871.

EUGENE F. WEIGEL,
Secretary of State.

STATE OF MISSOURI, *ss:*

I, Michael K. McGrath, secretary of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of the resolution of the board of directors of the Kansas City, Memphis and Mobile Railroad Company to extend road, filed September 17, 1872, as the same appears on file and of record, as the law directs, in this office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri.

Done at office, in the city of Jefferson, this nineteenth day of September, A. D. eighteen hundred and eighty-seven.

[SEAL.] MICH'L K. McGRATH,
Secretary of State.

The following resolution was offered by Mr. P. A. Ladue, to wit:

At a meeting of the board of directors of the Kansas City, Memphis & Mobile Railroad Company, held at Clinton on the 31st day of August, 1871, more than two-thirds of the directors being present, the following resolution was unanimously passed & adopted, to wit:

229 Resolved, That the line of railroad of this company be, and the same is hereby, extended from its northern terminus, at the Atlantic & Pacific railroad, in a general northwestern direction to Kansas City, in Jackson county, in the State of Missouri.

I certify that the foregoing is a true & correct copy of a resolution adopted by the board of directors of the Kansas City, Memphis and Mobile Railroad Company at a meeting thereof held as afore-

said, & that there were present & voting twelve of the thirteen directors of said company.

D. C. STONE, *President.*

STATE OF MISSOURI, } ss:
County of Henry, }

Peter Albert Ladue, Dewitt C. Stone, & Robert C. McBeth, being duly sworn, state on their oaths that they are directors in the Kansas City, Memphis and Mobile Railroad Company; that at a meeting of the directors of said company held at the town of Clinton, in the county of Henry, in the State of Missouri, on the 31st day of August, 1871, at which meeting there were present twelve of the directors of said company, there being thirteen directors in all, the resolution, of which the foregoing is a true and correct copy, was unanimously adopted and spread upon the records of the company, and that at and before the adoption of said resolution as aforesaid there had been and is subscribed & secured to the capital stock of said company more than the sum of one thousand dollars per mile for the entire distance covered by the line over and upon which, by said resolution of said board of directors, the railroad of said
230 company is extended, & that more than five per centum has been paid thereon to the said directors in good faith to construct, maintain, & operate the said railroad over and upon the line designated in said resolution.

PETER A. LADUE.
D. C. STONE.
R. C. McBETH.

Sworn to and subscribed before me this Sept. 12, 1872.

In testimony whereof I have hereto set my hand and affixed my notarial seal this Sept. 12th, 1872.

[SEAL.]

R. G. BOONE,
Notary Public, Henry Co., Mo.

STATE OF MISSOURI, } ss:
County of Jackson, }

We, R. T. Van Horn, president of the Kansas City, Memphis & Mobile Railroad Company, and Wm. O. Mead, secretary, being duly *duly* sworn, on our oaths state that the foregoing resolution was properly passed and entered on the records of said company, and that the foregoing contains a true, full transcript thereof taken from the records of said company as the same were entered therein on the 31st day of August, A. D. 1871.

[SEAL.]

R. T. VAN HORN,
President K. C., M. & M. R. R. Co.
WM. O. MEAD, *Secretary.*

Subscribed and sworn to before me this the 2nd day of Sept., 1872.

[SEAL.]

S. W. BOUTON,
Notary Public.

Filed September 17th, 1872.

EUGENE F. WEIGEL,
Sec'y of State.

231 STATE OF MISSOURI, *ss:*

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of a certificate of the Clinton and Kansas City branch of the Tebo and Neosho Railroad Company in the matter of the sale and conveyance of the Clinton and Kansas City branch of the Tebo and Neosho Railroad Company to the Kansas City, Memphis & Mobile Railroad Company by the Tebo and Neosho Railroad Company, filed November 16, 1871, as the same appears on file and of record, as the law directs, in this office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri.

Done at office, in the city of Jefferson, this nineteenth day of September, A. D. eighteen hundred and eighty-seven.

MICH'L K. McGRATH,
[SEAL.] *Secretary of State.*

We, the undersigned, Dewitt C. Stone, chairman, and Robert C. McBeth, secretary *pro tempore*, of the construction committee of the Clinton and Kansas City branch of the Tebo and Neosho railroad, the said committee being duly appointed and invested by the board of directors of the Tebo and Neosho Railroad Company with all the rights and powers which the said company have and possess or may possess and exercise with reference to said branch railroad by resolution duly and unanimously adopted by the said board of directors and entered upon its records, do hereby certify that on the thirty-first day of August, A. D. eighteen hundred and seventy-one, the said Tebo and Neosho Railroad Company, by and through
232 the said committee thereunto authorized and empowered as aforesaid, and being also thereunto authorized, directed, and instructed by the holders of all the capital stock subscribed to the said company in the name of and to aid in the construction of the said branch railroad, did sell, assign, & convey the said Clinton and Kansas City branch of the Tebo and Neosho railroad, together with all and singular its property, real and personal, choses in action, rights, powers, and franchises, unto the Kansas City, Memphis and Mobile Railroad Company, and that a majority of the holders of the capital stock of said Tebo and Neosho Railroad Company subscribed in the name of said branch railroad did on the day aforesaid assent to said vote in favor of making said sale, assignment, and conveyance, and did thereafter assent thereto in writing, and did in writing approve, ratify, and confirm the said sale, transfer, assignment, and conveyance; and we do further certify that the action aforesaid of said committee of the said stockholders is entered at length upon the records authorized and directed by the said board of directors of the Tebo and Neosho Railroad Company to be kept by said committee.

In testimony whereof we have hereunto subscribed our names and affixed the seal of said branch road this 18th day of October, A. D. 1871.

[SEAL.] DEWITT C. STONE,
Chairman of the Committee of Construction of the Clinton & Kansas City Branch of the Tebo and Neosho Railroad.
ROBERT C. McBETH,
Secretary Pro Tempore.

Filed November 16, 1871.

EUGENE F. WEIGEL,
Sec'y of State.

233 BERTHOLD SCHLESINGER and SEBASTIAN B. SCHLESINGER
vs.
THE KANSAS CITY AND SOUTHERN CONSTRUCTION COMPANY.

Attachment in the circuit court of Kansas City, Mo., in the above-entitled cause to secure the debt, the amount sworn to being thirty-nine thousand eight hundred dollars.

I, the undersigned, sheriff of Jackson *of Jackson* county, State of Missouri, did, on the 7th day of October, A. D. 1881, levy upon and attach all right, title, and interest of the said defendants, The Kansas City and Southern Construction Company, of, in, and to the following-described property, to wit: The Kansas City, Memphis and Mobile railroad running from Kansas City, Jackson county and State of Missouri, in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, and through the States of Missouri and Arkansas, together with all and singular the rights of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever or wheresoever situated of and belonging or in anywise appertaining unto said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company, being the same property conveyed by the Kansas City and Southern Construction Company to the Kansas City and Southern Railroad Company by deed dated on the 24th day of May, A. D. 1880, and recorded in the recorder's office within and for the county of Jackson and State of Missouri in Book B # 45, at page 606 and 607.

JOHN C. HOPE, *Sheriff.*

Filed for record and duly recorded in my office on the 7th day of October, A. D. 1881, at 5.30 p. m.

CHAS. D. LUCAS, *Recorder,*
By F. A. POTTS, *D. R.*

234 & 235 STATE OF MISSOURI, } ss:
County of Jackson, }

I, R. T. Hinde, recorder of deeds within and for the county of Jackson aforesaid, do hereby certify that the above and foregoing is a full, true, and complete copy of the notice of attachment in the

circuit court and note of record thereon, Barthold Schlesinger and Sebastian B. Schlesinger *vs.* Kansas City and Southern Construction Company, by John C. Hope, sheriff of Jackson county, Missouri, as the same appears of record in my office in Book Series B 67, page 467 and following.

In testimony whereof I hereunto set my hand and affix the seal of said office, at Kansas City, Mo., this 22nd day of Sept., A. D. 1887.

[SEAL.]

R. T. HINDE, *Recorder*,
By D. W. WALLACE, *Deputy*.

(Copy.)

Abstract of Attachment.

BERTHOLD SCHLESINGER *et al.*
vs.
KANSAS CITY & SOUTHERN CONSTRUCTION CO.

I, Daniel P. Ingram, sheriff of Cass county, in the State of Missouri, hereby certify that under and by virtue of a writ of attachment issued from the office of the circuit court of Jackson county, State aforesaid, dated the 7 day October, 1881, wherein Barthold Schlesinger and Sebastian Schlesinger — plaintiff- and Kansas City and Southern Construction Company are defendants, I have, on this 12th day of October, 1881, attached, levied upon, and seized all the right, title, and interest of the above-named defendant, The
236 Kansas City and Southern Construction Company, of, in, and to the following-described real estate and property, viz.: The Kansas City, Memphis and Mobile railroad running from Kansas City, Jackson county and State of Missouri, in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, through the State- of Missouri and Arkansas, together with all and singular the right of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever and whe-esoëver situated of and belonging or in anywise appertaining to the said railroad, together with all the franchises of the Kansas City, Memphis, Mobile Railroad Company, and that the amount of the debt claimed in said writ of attachment is thirty-nine thousand and eight hundred dollars and — cents.

Witness my hand this 12 day of October, 1881.

DANIEL P. INGRAM,
Sheriff of Cass Co., Mo.,
By ANDREW J. SUMMERS, *Dep-ty*.

The foregoing attachment was filed for record in this office at 4.45 p. m. on Oct. 12, 1881.

C. M. HACKLER, *Recorder*,
By LEWIS B. PAYNE, *Deputy*.

Certificate.

STATE OF MISSOURI, } ss:
County of Cass, }

I, Ben. C. Smith, recorder of deeds within and for the county and State aforesaid, do hereby certify that the above and foregoing is a full and true copy of an instrument of writing, together with the proof of acknowledgment and date of filing, as the same appears of record in my office in Book 42, at page 236.

Witness my hand and official seal this 19th day of September, A. D. 1887.

BEN. C. SMITH, *Recorder.*

237 STATE OF MISSOURI, } ss:
County of St. Clair, }

In the Circuit Court of Jackson County, Mo.

BERTHOLD SCHLEISINGER & SEBASTIAN B. SCHLEISINGER, Pl'ffs, }
vs.
KANSAS CITY AND SOUTHERN CONSTRUCTION COMPANY, Def'ts. }

BERTHOLD SCHLEISINGER and SEBASTIAN B. SCHLEISINGER, Plaintiffs, }
vs.
KANSAS CITY AND SOUTHERN CONSTRUCTION COMPANY, Defendant. }

Abstract of Attachment.

I, John P. Gordon, sheriff within and for the county of St. Clair and State of Missouri, do hereby certify that by virtue of a writ of attachment issued by the clerk of the circuit court of Jackson county, Mo., wherein Berthold Schleisinger and Sebastian B. Schleisinger — plaintiffs and Kansas City and Southern Construction Company are defendants, and to me directed and delivered, returnable to the April term, A. D. 1882, of the circuit court of Jackson county, at Kansas City, Mo., I have levied upon, seized, and attached all the right, title, and interest of the Kansas City and Southern Construction Company of, in, and to the Kansas City, Memphis and Mobile railroad, running from Kansas City, Jackson county and State of Missouri, in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, through the State of Missouri and Arkansas, together with all and singular the rights of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever and wheresoever situated, of and belonging to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company, being the same property conveyed by the Kansas City and Southern Construction Company by deed dated on the 24th day of May, A. D. 1880, or so much thereof as

may be sufficient to satisfy the sum of thirty-nine thousand
238 eight hundred dollars (39,800), with interest and damages and costs of suit: all done in my said county.

Given under my hand this 11th day of October, A. D. 1881.

JOHN P. GORDON,
Sheriff of St. Clair County, Mo.

Filed for record October 11th, 1881, at 11 o'clock and 40 minutes a. m.

W. U. TOWNSEND, *Recorder.*

STATE OF MISSOURI, }
County of St. Clair, } *ss:*

I, Daniel P. Morgan, recorder of deeds in and for said county, hereby certify that the above is a true copy of the abstract of attachment in case of Berthold Schleisinger *et. al. vs.* Kansas City and Southern Construction Company as the same appears of record in Book 12, page 462, in my office.

Witness my hand and official seal. Done at office, in Osceola, this 19th day of Sept., 1887.

DANIEL P. MORGAN, *Recorder.*

239 *Abstract of Attachment.*

I, A. B. Hopkins, sheriff of Henry county, in the State of Missouri, hereby certify that under and by virtue of a writ of attachment issued from the office of the clerk of the circuit court of Jackson county, State aforesaid, dated October 7th, 1881, wherein Berthold Schlesinger and Sebastian Schlesinger are plaintiffs and The Kansas City and Southern Construction Company is defendant, I have on this 12th day of October attached, levied upon, and seized all the right, title, and interest of the above-named Kansas City and Southern Construction Company of, in, and to the following real estate, viz:

The Kansas City, Memphis and Mobile railroad, running from Kansas City, Jackson county, Mo., in the direction of Memphis, in the State of Tennessee, and Mobile, in the State of Alabama, through the States of Missouri and Arkansas, together with all and singular the right of way, road-bed, masonry, property, rights of property, and appurtenances whatsoever or wheresoever situated of and belonging or in anywise appertaining to said railroad, together with all the franchises of the Kansas City, Memphis and Mobile Railroad Company, being the same property conveyed by the Kansas City and Southern Construction Company to the Kansas City and Southern Railroad Company, and that the amount of the debt claimed by plaintiff- in said writ of attachment is thirty-nine thousand eight hundred dollars.

Witness my hand this 12th day of October, 1881.

A. B. HOPKINS,
Sheriff of Henry County, Mo.

Filed for record October 12th, 1881, at 8 o'clock 30 m. a. m.
GEO. W. ARMSTRONG, *Recorder.*

240 STATE OF MISSOURI, }
County of Henry, } *ss:*

I, W. H. Allison, recorder of deeds within and for the county and State aforesaid, do hereby certify that the foregoing is a full, true, and complete copy of the abstract of attachment in the matter of Berthold Schlesinger *et al.* against Kansas City and Southern Construction Company as the same is found of record in Book 37, on page 42, of the deed records of Henry county, Missouri.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the city of Clinton, this 19th day of September, A. D. 1887.

[SEAL.]

W. H. ALLISON, *Recorder.*
By T. A. CHEANEY, *Deputy.*

241 In the Circuit Court of the United States for the Western District of Missouri, Western Division, at Kansas City.

BERTHOLD SCHLESINGER *et al.*, Complainants,
vs.
KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*, Respondents. } Chancery. No. 401.

Now come the complainants and file herein the following documentary evidence:

(1st.) Certified copy of deed of trust executed by the Kansas City and Southern Railway Company to the Farmers' Loan & Trust Company, dated the first day of January, 1883, and given to secure first-mortgage bonds to the amount of twenty thousand dollars ($20,000) per mile of constructed road, duly acknowledged and recorded.

(2nd.) Copies of records made by the Kansas City & Southern Railway Company to the railroad commissioners of the State of Missouri for the years ending December 31, 1883, and Dec. 31, 1886, duly sworn to by the president of said company and certified by the secretary of said railroad commissioners.

(3rd.) Stipulation duly signed by counsel agreeing that said last-mentioned copies of reports may be read in evidence.

J. BRUMBACK & GEO. W. McCRARY,
Attorneys for Complainants.

242 This indenture made the first day of January A. D. one thousand eight hundred and eighty-three, by and between the Kansas City and Southern Railway Company a corporation duly created and organized under the laws of the State of Missouri, party of the first part, and the Farmers' Loan and Trust Company of the city of New York, a corporation of the State of New York, party of the second part, witnesseth,

That whereas, the party of the first part is duly authorized by

law to issue and dispose of its bonds for such purposes as may be necessary for building, completing, furnishing, equipping and operating its railroad and for other legal purposes, and to mortgage its corporate property and franchises, to secure the payment of said bonds, and

Whereas the party of the first part will need money for the purpose of completing, furnishing, equipping and operating its railroad and for other lawful purposes, and

Whereas, the stockholders and directors of the party of the first part have duly authorized and directed that the party of the first part for the purposes aforesaid do make, issue and negotiate a series of bonds to be known as "first-mortgage sinking-fund bonds" amounting in the aggregate to six million five hundred thousand dollars and consisting of six thousand five hundred bonds of the denomination of one thousand dollars each, numbered consecutively from one to six thousand five hundred inclusive, and bearing interest at the rate of six per centum per annum, payable semi-annually on the first day of July and January of each year, in gold coin of the United States of America, upon the presentation of coupons thereto annexed; said bonds to be dated the first day of January one thousand eight hundred and eighty-three, the principal of said bonds to fall due on the first day of January
243 in the year of our Lord one thousand nine hundred and thirteen, the principal and interest of said bonds to be payable at the office or agency of the party of the first part, in the city of New York in like gold coin of the United States, and,

Whereas, the stockholders and directors of the part- of the first part have further authorized and directed that the said bonds and interest coupons should be secured by a deed of trust or mortgage on all the property, real estate and franchises of the party of the first part, in such manner and form as to give the most complete and ample security possible for the payment of said bonds, and directed that the said bonds and deed of trust should be executed on the part and in the behalf of the party of the first part by its president and secretary and that the corporate seal of the party of the first part should be affixed thereto, and further authorized and empowered the president and secretary of the party of the first part to make, execute, sign and deliver the bonds, coupons and deed of trust or mortgage heretofore referred to in such manner and form as they might deem proper and expedient for carrying out the purposes hereinbefore referred to, and

Whereas, under and by virtue of the power and authority aforesaid the party of the first part by its president and secretary has made and executed six thousand five hundred bonds numbered consecutively from one to six thousand five hundred inclusive and — of which bonds except as to the number is of the following tenor and form, that is to say:

244 UNITED STATES OF AMERICA, }
State of Missouri. }

$1,000. Kansas City and Southern Railroad Company. $1,000.

First-mortgage Sinking-fund Bond.

Interest, 6 per cent.

The Kansas City and Southern Railway Company hereby acknowledges itself indebted and for value received promises to pay to the Farmers' Loan and Trust Company of New York, or bearer, one thousand dollars in gold coin of the United States of America at the agency of said railway company in the city of New York on the first day of January in the year one thousand nine hundred and thirteen and the interest thereon at the rate of six per centum per annum, from the first day of January in the year one thousand eight hundred and eighty-three, in like gold coin payable semi-annually on the first days of July and January in each year on the presentation and surrender of the annexed coupons at the agency aforesaid as they severally become due; in case of non-payment of any semi-annual instalment of interest on this bond, which shall have become payable and shall have been demanded, if such default shall continue for six months after such demand, the principal of this bond shall become due and payable in the manner and with the effect provided in the mortgage hereinafter mentioned. This bond is one of a series of bonds for one thousand dollars each, numbered from one to sixty-five hundred inclusive and amounting in the aggregate to six million and five hundred thousand dollars all bearing date on the first day of January, A. D. 1883, and all of like tenor the payment of all which said bonds is secured by a first mortgage or deed of trust dated the first day of January, A. D. 1883, executed by said railway company conveying to the said
245 Farmers' Loan and Trust Company of New York in *in* trust for the holders of said bonds, all that part of the railway of the said railway company constructed and to be constructed extending from the point of its commencement in Kansas City, in a southeasterly direction by way of Clinton in the State of Missouri, as is in the said deed of trust fully set forth; said mortgage also conveys all the franchises, equipments and appurtenances of said railway company. This bond is also entitled to the benefits and subject to the conditions of the sinking fund by said deed of trust provided. The issue of said bonds is to be restricted to an amount not exceeding twenty thousand dollars per mile for every mile of said railway according to the provisions of the mortgage by which said bonds are secured. This bond may be registered on the books of said railway company, at its agency in the city of New York at the option of the holder hereof after which the same shall be transferrable only by a registered endorsement of said agency unless the same shall be transferred and assigned "to bearer" when it may pass by delivery. This bond shall not become obligatory until it shall have been authenticated by a certificate endorsed hereon and duly signed by the said Farmers' Loan and Trust Company.

In witness whereof the said Kansas City and Southern Railway Company have caused this bond to be signed by its president and secretary and its corporate seal to be hereto affixed this first day of January, A. D. one thousand eight hundred and eighty-three.

THE KANSAS CITY AND SOUTHERN RAILWAY COMPANY,
By —— ——, *President.*
—— ——, *Secretary.*

And each bond has or will have endorsed thereon a certifi-
246 cate by the party of the second part hereto in the following words, that is to say:

Trustee's Certificate.

The Farmers' Loan and Trust Company hereby certifies that this bond is one of the bonds secured by the within-described mortgage which mortgage has been duly recorded.

THE FARMERS' LOAN AND TRUST COMPANY, *Trustee,*
By —— ——, *President.*

And none of said bonds shall be valid or be secured by this mortgage until said certificate signed as aforesaid is endorsed thereon. Each of said bonds has coupons attached for the instalments of semi-annual interest hereinbefore provided for.

Now therefore, this indenture witnesseth that the said party of the first part for and in consideration of the promises and of the sum of one dollar to it well and truly paid by the party of the second part the receipt whereof is hereby acknowledged, and for the purpose of securing the principal and interest of said bonds and each of them, has granted, bargained, sold, assigned, transferred and confirmed, and by these presents doth grant, bargain, sell, assign, transfer, and confirm unto the party of the second part as trustees, and in trust to its successor or successors all and singular the railroad, property and franchises of the party of the first part and described as follows to wit:

The entire line of railway of the party of the first part commencing in Kansas City in the county of Jackson in the State of Missouri and extending thence in a southeasterly direction by way of the city of Clinton in Henry county to the city of Osceola in the county of St. Clair in said State of Missouri, thence in a
247 southeasterly direction through the counties of Polk, Webster, Douglass and Howell and through such other counties as any change of the line now located may require, to the State line of Arkansas; said line of road with branches and sidings being about three hundred miles in length, as said line of railroad is now located or constructed or as the same may be hereafter located, or constructed including all the railways, ways and rights of way, depot grounds and other lands, all tracks, bridges, viaducts, culverts, fences and other structures, all depots, station-houses and other buildings and all machine shops and other shops whether the

aforenamed property or any part of it is now held or may hereafter be held or in any way acquired for use in connection with the said railway or the business thereof, and including also all locomotives, tenders, cars and other rolling stock or equipments, all machinery, tools, implements, fuel and materials for the constructing, operating, repairing or replacing the said railway or any part thereof, or any of its equipments and appurtenances whether now held or hereafter acquired all which things are hereby declared to be appurtenances and fixtures of the said railway; it being the intent and meaning of this deed of trust that the same shall apply only to the railway of said railway company located in the State of Missouri, and the property and franchises acquired or hereafter acquired applicable thereto.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the revenue, remainders, tolls, incomes, rents, issues and profits thereof, and also all the estate, right, title, interest property,
248 possession, claim and demand, whatsoever as well in law as in equity of the party of the first part in and to the same and any and every part thereof, with the appurtenances.

To have and to hold all the aforesaid railroad, real estate property and franchises, and the appurtenances thereunto belonging unto the party of the second part in trust nevertheless, for the uses and purposes hereinafter expressed and declared of and concerning the same, that is to say:

And this indenture is upon the express condition that if the said party of the first part shall well or truly pay or cause to be paid to the holder or holders of said bonds the principal sum of money therein mentioned, according to the true intent and meaning thereof with the interest thereon according to the terms and conditions thereof, then in that case the lien or incumbrance hereby created for the security and payment thereof and the estate and interest of the party of the second part, in the property aforesaid shall cease and determine and at the request of the said party of the first part or its assigns this deed of trust or mortgage shall be satisfied and released and satisfaction thereof shall be entered of record at the cost of the party of the first part.

But, if the party of the first part shall fail to pay or cause to be paid the interest on any of said bonds secured hereby for six months after the same shall become due and payable, and after demand made for the payment of the same, at the office or agency of the said party of the first part, in the city of New York as provided in said bonds, or if the principal sum of any of said bonds when and as the same shall become due and payable shall not be paid for the period of six months after demand made for the payment of
249 the same as aforesaid, the said party of the second part itself and its officers, attorneys or agents and its successor or successors in this trust are authorized and required upon the written request of the holders of one-third of said bonds then outstanding, the principal or interest of which shall be then in arrears and unpaid as aforesaid, to offer for sale the said railroad with all the prop-

erty herein conveyed as an entirety and to sell the same at public vendue to the highest bidder at the court-house of the said county of Jackson, in the city of Kansas City, first giving eight weeks' notice thereof and the time, place and terms of such sale, by publication in at least two papers published in the city of Kansas City in the State of Missouri and two published in New York city in the State of New York. The said trustees are hereby authorized to adjourn said sale from time to time in their discretion and if so adjourned to make the sale without further notice at the time and place to which the same may be adjourned; and said trustee its successor or successors in this trust is hereby authorized upon any sale as aforesaid to receive from any purchaser or purchasers the bonds issued by the party of the first part and the payment of which is secured hereby at their *pro rata* value at the option of such purchaser or purchasers and said trustee is also hereby irrevocably empowered upon the making of any sale as aforesaid to make, execute and deliver any conveyance or conveyances that may be necessary to fully and completely transfer and convey the property hereby mortgaged to the purchaser or purchasers who may immediately enter upon and take possession of the same and all benefits and equity of the said Kansas City and Southern Railway Company, its successors and assigns therein, shall be forever barred by such conveyance or conveyances and the recitals therein contained shall be held and taken as *prima facie* evidence.

250 And it is hereby stipulated and agreed that the said party of the second part may at all times and in all cases act in this trust and for the purposes therewith connected and herein provided for by one or more of its officers, attorneys or agents as it may from time to time appoint and constitute for that purpose as validly and effectually as any individual could do in the performance of the trust herein created. And the said party of the second part after the payment of the costs and expenses of this trust and sale, including just allowance for attorneys' fees and counsel fees and all other expenses advances or liabilities made or incurred by the said trustee, in respect to the mortgaged property or in the performance of any *of any* of the trusts herein contained together with all reasonable compensation for their services in the execution of this trust and the discharge of the duties hereby devolved upon them, shall apply the remaining proceeds of such sale to the payment of first the interest which shall have at that time accrued on said bonds or so many of them as shall have been issued and then outstanding and ratably until all such interest is paid and afterward to apply the remainder to the payment of the principal of said bonds equally and ratably until such principal shall be paid and shall then pay the surplus if any to the party of the first part, its successors or assigns.

It is mutually understood and agreed that the actual possession use and management of the said railroad and property herein conveyed together with the current revenues therefrom, with the appurtenances thereto belonging shall be and remain with the party of the first part so long as there shall be no default in pay-

251 ment of interest or principal of the said bonds as herein pro-

vided for. The said party of the first part further agrees to pay all taxes and assessments and other public charges which may be imposed upon the property hereby conveyed and in case of its failure so to do, the party of the second part may pay the same and all sums so paid shall with six per cent. interest per annum be paid by the party of the first part to the trustee for the time being under this deed of trust and in default of payment within two months after demand the principal of said bonds shall, if the trustee so elect, become due in like manner with like effect as in default of payment of any instalment of interest.

And the party of the first part further covenants and agrees that for the further security of said bonds and for the purpose of providing a sinking fund for the redemption thereof, it will pay over to the party of the second part or its successor or successors in said trust, on the first days of January and July in the year A. D. 1885, and on the same days in each year thereafter until the maturity of said bonds the sum of one-half of one per centum of the principal of the total amount of the said bonds, which sinking fund shall be by said trustee or by its successor or successors invested as follows: They shall immediately subsequent to such payment give notice by public advertisement for two successive weeks in a newspaper of general circulation in the city of New York, stating the amount to be invested and naming the place, day and how when they will open tenders to sell to them any of the bonds issued under this mortgage for the sum so advertised at a maximum rate of five per cent. premium exclusive of accrued interest and in the event that no bonds or that an insufficient amount of bonds are tendered at or below the maximum limit aforesaid, then the said trustee shall proceed to draw by lot from the bonds outstanding such amount as may be necessary to complete the investment of the sum advertised and they shall then give notice by publication as aforesaid stating the number of the bonds so drawn and that said bonds will be purchased at five per cent. premium on presentation and delivery of the same to the trustee on the maturity of the next coupon, from which date all interest on such bonds shall be paid to the sinking fund and not to the holder thereof.

252

The bonds thus purchased by and for the sinking fund shall be held by such trustee, and the accruing interest therein shall be added to the sum to be paid as aforesaid by the party of the first part and shall be in like manner invested.

When all said bonds secured hereby shall have been purchased or extinguished and all sums due the trustees for services and advances have been paid the bonds purchased by and for the sinking fund as aforesaid shall be delivered to the party of the first part. In case of default in the payment of any instalment due the sinking fund by the party of the first part, said default continuing for the period of two months, the said trustee may proceed as in case of a default in payment of principal or interest of said bonds as hereinbefore provided.

And it is further agreed and provided that the party of the second part hereto or any successor or successors of said party to the

trusts herein created may resign or discharge itself or themselves from said trust by giving notice in writing to that effect to the party of the first part, and in case there shall at any time become a vacancy in said trusteeship by resignation, death, refusal, or inability to act, or from any other cause, then the president of
253 the party of the first part or, if he fails or refuses to act, any holder of the bonds hereby secured may cause thirty days' notice to be given in at least one newspaper of general circulation published in each of the cities of Kansas City and New York that such vacancy exists and designating a time and place in the city of New York for the holders of bonds hereby secured to meet and choose a successor or successors to fill such vacancy, and at such meeting the person or persons holding or representing a majority of the bonds then and there represented may fill said vacancy, and the election and appointment so made shall be certified to in writing by the chairman of such meeting, which certificate shall be by him acknowledged in accordance with the laws of the State of Missouri, and shall deliver the same to the president of the party of the first part or file it for record in the recorder's office of the county of Jackson, in the State of Missouri, and thereupon the person or persons so appointed shall be fully vested with all the powers and trusts herein given to the party of the second part as fully as if he or they were made parties hereto.

The said party of the first part hereby covenants and agrees that with the exception of one hundred and fifty of said bonds of one thousand dollars each, numbered from one to one hundred and fifty inclusive, to be delivered to the party of the first part on account of work already done no bonds shall be issued under this mortgage except upon road actually constructed and ready to be put in operation in sections of five miles or more, and the party of the first part shall furnish and deliver to the party of the second part the sworn certificate of the chief engineer of the party of the first part
254 in charge of construction which shall state the number of miles actually completed, which certificate shall be accepted as evidence of such completion, and upon which the bonds shall be issued and delivered by the party of the second part upon the written order of the president of the party of the first part at the rate of not exceeding twenty thousand dollars per mile upon road so completed.

Provided that the said party of the second part shall deliver to the president of the party of the first part any of said bonds upon receiving in cash the price at which said bonds may be sold by said company of which proce- the president's certificate shall be received as conclusive evidence and the money so received shall be held in place of said bonds and paid to said president upon the completion of said road in sections of five miles or more and the engineer's certificate thereof as above provided.

And the party of the first part further agrees with the party of the second part and its successors to execute and deliver to them such further deeds covenants and assurances as may be necessary or proper to carry out the objects and purposes of this instrument.

And it is further agreed that the party of the second part and its

successors in this trust shall be accountable only for reasonable care and diligence in the performance of the trust hereby created; and the party of the second part accepts the trust hereby created and declared and agrees to discharge the same in pursuance of the provisions in that behalf herein contained.

In witness whereof the said Kansas City and Southern Railway Company hath caused these presents to be signed by its president and secretary and its corporate seal to be hereunto affixed and the party of the second part has signified its acceptance of the trusteeship hereinbefore created by causing these presents to be
255 signed by its president and its corporate seal to be hereunto affixed all the day and year first above written.

THE KANSAS CITY AND SOUTHERN RAILWAY COMPANY,
[CORPORATE SEAL.] By WILLIAM BAILEY, *President.*
AMOS TENNEY, *Secretary.*
THE FARMERS' LOAN AND TRUST COMPANY,
By R. G. ROLSTON, *President.*

Attest:
[SEAL.] WM. H. LEUFF, *Secretary.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that, on this 25th day of April, A. D. 1883, before me, the undersigned, a commissioner of deeds for the State of Missouri residing in the city of New York, came William Bailey, president, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument in writing as the president of the Kansas City and Southern Railway Company, and he acknowledged the same to be the act and deed of the said company and his act and deed as president thereof for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this 25th day of April, A. D. 1883.

CHARLES EDGAR MILLS,
[SEAL.] *Commissioner for Missouri in New York,*
115 *and* 117 *Broadway, N. Y. City.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that, on this 25th day of April, A. D. 1883, before me, the undersigned, a commissioner of deeds for the
256 State of Missouri residing in the city of New York, came R. G. Ro-ston, president, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument in writing as the president of the Farmers' Loan and Trust Company, and he acknowledged the same to be the act and deed of the said company and his act and deed as president thereof for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this 25th day of April, A. D. 1883.

CHARLES EDGAR MILLS,
[SEAL.] *Commissioner for Missouri in New York,*
115 *and* 117 *Broadway, N. Y. City.*

STATE OF MISSOURI, }
County of Henry, } *ss:*

I, W. H. Allison, the undersigned, recorder of deeds, do certify that the within and foregoing is a full, true, and complete copy of a mortgage or deed of trust from the Kansas City and Southern Railway Company to the Farmers' Loan and Trust Company of New York, filed for record April 30, 1883, at 11.30 o'clock a. m., and duly recorded in Book 44, pages 160 to 169, inclusive, of the deed records of Henry county, Missouri.

In witness whereof I have hereunto set my hand and affixed my official seal.

Done at office, in the city of Clinton and State aforesaid, this 22 day of November, A. D. 1888.

W. H. ALLISON, *Recorder,*
By T. A. CHEANEY, *Deputy.*

257 Report of the Kansas City and Southern Railway Company to the railroad commissioners of the State of Missouri for the year ending December 31st, 1883.

[SEAL.]

Notice.

The law requires that the annual statement of the railroad companies owning or operating lines in Missouri must be transmitted to the office of the railroad commissioners "on or before the first day of April" of each year. It is expected that the required statement will be forwarded promptly.

258 PART FIRST.

Statement as Specified by Statute.

Stock.

1. Amount of capital stock subscribed (state each class separately):

Authorized capital stock	$2,900,000
Original stock subscribed	840,000
Additional Dec. 21st, 1880	1,260,000
" Jan'y 22d, 1881	500,000
" Oct. 14th, 1881	300,000
Total	$2,900,000

Number of shares (each class separately):

.....	(.....)
....	(.....)
....	(.....)
.....	(.....)

Par value thereof, 100 per share.

2. * Names of owners of stock with the amount owned by them respectively and the residence of each stockholder as far as known.

3. Amount of stock paid in, $—.

* By whom paid.

Assets and liabilities.

4. Amount of assets (in gross), $—.

5. Amount of liabilities (in gross), $—.

* Append a list giving names and residences of stockholders as shown by transfer books when closed prior to the election of directors for 188–.

* Append list to this statement.

259 2.

Officers.

5. Names and places of residence of officers of company (directors and all general officers):

Names.	Title of office.	Residence.
William Bailey	President & gen'l manager, director.	3334 Washington Ave., St. Louis.
Amos Tenney	Secretary & director	11 Pine St., New York city.
W. C. Smith	Treasurer	No. 2 Wall St., New York city.
E. L. Martin	Local treasurer & director	Kansas City, Mo.
D. Stillinger	Superintendent	Clinton, Mo.
G. W. Heylman	Chief eng.	Clinton, Mo.
F. M. Green	Contractor	Clinton, Mo.
S. I. Clark	Director	Helena, Ark.
J. C. Webb	Director	Indianapolis, Ind.
E. G. Merriam	Director	St. Louis, Mo.
J. H. Nash	Director	Austin, Mo.
S. G. Wheeler	Director	New York city.
J. W. Miller	Director	Kansas City, Mo.

260 3.

Debt.

6. Amount of funded debt (in detail).

The first mortgage provides for $20,000 per mile of 1st mortgage bonds, which can only be listed by trustees upon actually completed road in lengths of five miles or more. These bonds bear six per

cent. interest; Farmers' Loan and Trust Company of New York, trustees.

7. Amount of floating debt (in detail).

Total debt, $—.

261 4.

Values (in Missouri).

8. Estimated value of road-bed, including iron (or steel), and bridges (state value of each main and branch line separately):

.....$	.....$
.....$	.....$
.....$	.....$
.....$	.....$
.....$	.....$

9. Estimated value of rolling stock .....$

11. Estimated value of station buildings and fixtures (state value on each main and branch line separately):

.....$	.....$
.....$	.....$
.....$	.....$
.....$	.....$
.....$	.....$

11. Estimated value of other property on each line:

....$	... .$
.....$	.....$
.....$	.....$
.....$	.....$
.....$	.....$

Total value in Missouri .....$

262 5.

Track (in Missouri).

12. Length of single track on main line.

13. Length of double track on main line.

14. Length of branches (state each branch separately).

State whether branches have single or double track.

15. Aggregate length of siding.

Aggregate length of sidings and other tracks enumerated.

[Written across the face:] No report; road under construction.

263 6.

Movement of freight.

16. Number of tons of through freight carried during the (calender) year preceding the making of this statement.

17. Number of tons of local freight carried during the same time.

Earnings.

18. The monthly earnings for the transportation of passengers during the year.

19. The monthly earnings for the transportation of freight during the year.

(Also monthly earnings from other sources during the year.)

Table of Monthly Earnings.

Month.	Passengers.	Freight.	Other sources.	Totals.
January.				
February.				
March.				
April.				
May.				
June.				
July.				
August.				
September.				
October..				
November.				
December.				

[Written across the face:] No report; road under construction.

264 7.

Expenses.

20. Amount of expenses incurred during the year—
    In running and management of passenger trains . $
    In running and management of freight trains....
    In running and management of mixed trains...

21. The expenses incurred in running and management of the road for the year (other than in running and management of trains) including the salaries of officers, which shall be stated seperately .....

22. Amount expended for repairs (and renewals) including—
    Maintenance of way .....
    Repairs and renewals of bridges.....
    Ties and iron (or steel).....

23. Amount expended for improvements not included in last subdivision .....

24. Amount expended for motive power .....
    Amount expended for cars (all kinds) .....
    Amount expended for station-houses .....
    Amount expended for all other buildings and fixtures
    All other expenditures in the running and managements of road not included in any previous subdivision .....

Total ..... $

[Written across the face:] No report; road under construction and in hands of contractor.

265 8.

Rates.

25. Rates of fare for passengers for each month during the year 188–:

	Cents per mile.	
	Through.	Local.
January.		
February.		
March.		
April.		
May.		
June.		
July.		
August.		
September.		
October.		
November.		
December.		

26. The tariff of freight, showing the change of tariff, if any, during the year.

27. Append copy of each published rate of fare for passengers and tariff of freights issued for the government of agents during the year.

Are the rates of fare and tariff of freight the same as actually received?

If not, what was received?

[Written across the face:] No report; road under construction.

266 9.

Express companies.

28. What express companies run on the road?

And on what terms and conditions?

What kind of business is done by them?

Freight and transportation companies.

29. What freight and transportation companies run on the road?

Upon what terms?

Do the freight and transportation companies use the cars of the railroad company or cars furnished by themselves?

[Written across the face:] None to Jan. 1st. No report; road under construction.

267 10.

Freight and transportation companies—Continued.

30. What preference is given in speed or order of transportation to the freight or cars of such transportation companies?

31. What running arrangements have the —— company with other railroad companies?

[Written across the face:] No report; road under construction.

268 11.

Additional interrogatories by railroad commissioners authorized by statute.

Lines Operated by —— Company, Stating Each Line Separately.

From—	To—	Owned or leased.	Total length.	Length in Missouri.	Double track.		Sidings.	
					Total.	In Mo.	Total.	In Mo.

[Written across the face:] No report; road under construction.

269 12.

Earnings.

Total main and branch lines, $——.

Earning of Main and Branch Lines in Missouri, Stating Each Line Separately.

Per mile of road.	Per pass. train mile.	Per freight-train mile.	Per train mile, all trans.	Total.

Income derived from rent of property other than road and equipment.

Income derived from investment in stock, bonds, &c.

[Written across the face:] No report; road under construction.

270 13.

Expenses.

Total expenses main and branch lines.

Expenses of Main Line and Branches in Missouri—State Each Line Separately.

Per mile of road.	Per pass. train mile.	Per freight-train mile.	Per train mile, all trains.	Per cent. of earnings.	Total.

Amount paid other companies as rent for use of road, bridges, or equipment, specifying each company, with amount and basis on which rent is computed.

[Written across the face:] No report; road under construction.

271 14.

General balance-sheet at closing of accounts December 31, 188–.

Arrange accounts on the debit side of the general balance-sheet in the following order:

First. Enter those accounts which represent permanent investments, construction, roads purchased, equipment, real estate, bridges not included in construction account, steamboats, transportation lines, and stocks and bonds not held as temporary investments.

Second. Materials on hand as per inventory, such as iron, supplies, &c.

Third. Sinking funds in hand- of trustees.

Fourth. Accounts which represent assets relied upon to cancel debts or to make cash disbursements, such as cash, notes receivable, ledger balances collectable from corporations and individuals, &c.

Fifth. Profit and loss, or deficit, if any exists.

Cost of road.

Cost of equipment.

Other investments.

Supplies and materials on hand.

Sinking funds in hands of trustees.

Cash, cash assets, and other items, specifying same.

[Written across the face:] No report; road under construction.

272 15.

General balance-sheet at closing of accounts December 31st, 188–. Cr.

Arrange accounts on the credit side of the general balance-sheet in the following order:

First. Enter capital stock.

Second. Funded debt.

Third. Unfunded debt incurred for construction, equipment, or purchase of property.

Fourt-. Accounts which represent other debt liabilities, such as balances due corporations or individuals, unclaimed dividends, etc.

Fifth. Accounts which represent surplus, such as profit and loss, surplus, reserve, premiums on capital stock, etc.

Capital stock (Q. 5, page 3).

Funded debt (Q. 11, page 3).

Other debts, specifying same.

[Written across the face:] No report; road under construction.

273 16.

Net income, dividends, etc.

1. Total net income.
2. Percentage of same to capital stock and net debt ( ).
3. Percentage of same to total property and assets ( ).
4. Interest accrued during the year—
   On funded debt ( ) .....
   On other debt ( ) .....

Total.....

5. Dividends declared, —— per cent. for the year; amount, ——.
6. Date of last dividend declared, ——— —, ——.
7. Balance for the year, or surplus, ——.
8. Surplus at commencement of the year..... ( ).
   Deduct or add entries made in profit and loss account during the year, not included in the foregoing statement .....
9. Surplus at commencement of year as changed by aforesaid entries.....
10. Total surplus December 31, 188– .....

[Written across the face:] No report; road under construction.

274 17.

State actual amount per share paid in, in cash or its equivalents, in the different classes of stock of lines owned by the —— company.

State actual market value per share of the different classes of stock of lines owned by the —— company January 1, 188–.

State per cent. of face value of bonds of the lines owned by the —— company in cash or its equivalent.

State actual value of the bonds of the lines owned by the —— company January 1, 188–.

[Written across the face:] No report; road under construction.

275 18.

Cost of road, equipment, and property—Road and branches.

1. Grading and masonry.
2. Bridging.
3. Superstructure, including rails.
4. Land, land damages, and fences.
5. Passenger and freight stations, wood sheds, and water stations.
6. Engine-houses, car sheds, and turn-tables.
7. Machine shops, including machinery and tools.
8. Interest paid during construction, discount, etc.
9. Engineering, agencies, salaries, and other expenses during construction.
10. —— branch, original cost, ——, purchased for ——.
    —— " " " ——, " " ——.
11. Total cost of construction, ——.

Equipments.

12. Locomotives, (number, ——).
13. Snow ploughs on wheels, (" ——).
14. Parlor cars, (" ——).
15. Sleeping cars, (" ——).
16. Passenger, mail, and baggage cars, (" ——).
17. Freight and other cars, (" ——).
18. Total for equipments, ——.

Property acquired and on hand not included in the foregoing accounts.

19. Lands in ——, —— acres, valued at ——.
Amount forward, $——.

[Written across the face:] No report; road under construction.

276 19.

Cost of road, equipment, and property—Continued

Amount forward, ——.

20. Stock of —— R. R. shares purchased for ——.
" " " " ——.
21. Bonds of —— " " " ——.
" " nominal amount, " ——.
22. Other securities, viz: ——. " ——.
23. Other property.
24. Total for property acquired, etc., whole amount of permanent investment, ——.

*Property in Missouri.

Amount of supplies and material on hand.
Cash and cash assets.
Total property and assets of company, $——.

Taxes.

Taxes paid in Missouri:

State ($).
Local ($).

*Not including bonds and other securities held by company.

[Written across the face:] No report; road under construction.

277 20.

Expenditures charged to property account during the year.

Grading and masonry, $——.
Bridging.
Superstructure, including rails.
Land, land damages, and fences.
Passenger and freight stations, wood sheds, and water stations.
Engine-houses, car sheds, and turn-tables.
Machine shops.
Engineering, agencies, salaries, and other expenses during construction.

Locomotives,	(number, ——).
Snow ploughs on wheels,	(" ——).
Parlor cars,	(" ——).
Sleeping cars,	(" ——).
Passenger, mail, and baggage cars,	(" ——).
Freight and other cars,	(" ——).

Purchase of other roads, specifying what.
Subscriptions or loans to other roads, specifying each.
Any other expenditures charged to property account, specifying same.
Total, ——.
Property sold and credited property account during the year, specifying the same.
Net addition to property account for the year, $——.

[Written across the face:] No report; road under construction.

278 21.

Description of lines operated in Missouri by the —— company.

Miles of steel rails on lines operated in Missouri at close of year 188–.
Miles of steel rail on same laid during 188–.
Miles of new iron rail on same laid during 188–.
Miles of track on same ballasted at close of 188–.
Number of new ties put in on same during 188–.
Miles of fencing on same at close of 188–.
Miles of fencing on same built during 188–.
Number of highway crossings at grade.
" " " under railroad.
" " " over railroad.
" railroad " at grade.
" " " over other railroads.
" " " under other railroads.
Number of cattle-guards.
Average number of men in section gangs, including foreman.
Average number of miles of line to each gang.
Number of stations on lines operated in Missouri.
Miles of track (main or branch lines) abandoned or taken up during year.

Bridges.

	Total number.	Total length.	Built during 188–.
Iron truss.			
Iron girder.			
Iron trestle.			
Combination truss.			
Wooden truss.			
Wooden girder.			
Wooden trestle or pile.			
Stone arch culverts.			
Stone box culverts.			
Totals, ——.			

[Written across the face:] No report; road under construction.

279 22.

Table of Gradients in Missouri, Main and Branch Lines, Stating Each Line Separately.

Length of grades in miles and ascent per mile in feet.

Name of main line or branch.	Ascent in feet per mile eastward and northward.										
	20.	26.	30.	35.	40.	45.	53.	60.	66.	75.	80.
	90.	95.	100.	110.	115.	Level.	Total m'l's.				
	Ascent in feet per mile southward and westward.										
K. C. & S. R'y	20.	26.	30.	35.	40.	45.	53.	60.	66.	75.	80.
	2.	1.		2.	1.						
	90.	95.	100.	110.	115.	Level.	Total m'l's.				
						4.	10.				

280 23.

Missouri tonnage classified.

Tons of wheat.
" corn.
" other grain.
" cattle.
" hogs.
" other animals.
" other agricultural products.
" lumber and forest products.
" coal.
" plaster, lime, and cement.
" steel and iron rails.
" iron ore.
" lead ore.
" pig iron.
" pig lead.
" spelter.
" salt.
" iron, steel, and castings.
" stone and brick.
" agricultural implements.
" general merchandise and articles not enumerated.

[Written across the face:] No report; road under construction.

281 24.

Mileage, traffic, &c.

Miles run by passenger trains.
Rate of speed of express passenger trains, including stops.
Rate of speed of accommodation trains, " "
Miles run by freight trains.
Rate of speed of express freight trains, including stops.
Rate of speed of accommodation freight trains, including stops.

Miles run by other trains and for what purpose.
Total miles run.
Total number of passengers carried.
Total passenger mileage or passengers carried one mile.
Passenger mileage to and from other roads.
Number of tons carried.
Total freight mileage or tons carried one mile.
Freight mileage to and from other roads.
Highest rate of fare per mile for any distance (exceeding one mile).
Lowest rate of fare per mile for any distance (single fare)
Average rate of fare per mile (not including season tickets) received from local passengers on roads operated by this company.
Average rate of fare per mile for passengers on commutation tickets.
Average rate per mile for all passengers. Highest rate of freight per ton per mile for any distance.
Lowest rate of freight per ton per mile for any distance.
Average rate of local freight per ton per mile on roads operated by this company.
Average rate per ton per mile for all freight.
Average number of cars in freight trains.
Number of persons regularly employed by company, including officials.
Number of persons regularly employed by company in Missouri.
Number of persons regularly employed in superintendence and repairs of bridges.

[Written across the face:] No report; road under construction.

282 25.

Rolling stock.		Total number.
Locomotives leased from U. S. R. S. Co.		.....one (1)
Passenger cars, none in 1883.		
Dining cars, none.		
Official cars, none.		
Sleeping cars, none.		
Chair cars, none.		
Mail, baggage, & express cars, none in 1883.		
Box freight cars, three.....	These enumerations are made for Co., but contractor has lien upon or nominal ownership till paid.	....three (3)
Stock cars, none.		
Stock cars, double decked, none.		
Platform or flat cars, none.		
Way cars or cabooses, none.		
Coal cars.....		.... ten (10)
All other cars, none.		
Total freight cars, all kinds.....		Thirteen (13)

Number of locomotives equipped with train brakes.
Number of passengers equipped with train brakes.
Number of freight cars equipped with train or automatic brakes.
Number of passenger cars equipped with safety platform and coupling.

Persons Killed or Injured on Lines in Missouri During Year 188–.

	Killed.											Injured.										
	By derailments.	By collisions.	Caught in frogs.	Coupling cars.	Fell from train.	Getting off & on train in motion.	At highway crossings.	Stealing rides.	Trespassing on track.	Intoxicated.	Miscellaneous causes.	Total.	By derailment.	By collision.	Caught in frogs.	Coupling cars.	Fell from trains.	Getting off & on trains in motion.	Getting off & on trains.	At highway crossings.	Stealing ride.	Intoxicated.	Trespassing on track.	Miscellaneous causes.	Total.
Passengers.....																									
Employés.....																									
Others.....																									
Totals.....																									

283 26.

State number of buildings erected in Missouri during the year 188– by the —— Company.

	Where built.	Brick.	Wooden.
Office buildings.			
Station-houses.			
Freight houses.			
Machine shops.			
Blacksmith shops.			
Car shops.			
Engine-houses.			
Car sheds.			
Section-houses.			

Miles of telegraph lines in Missouri owned by —— Co.

Miles of telegraph line in Missouri operated on line of —— Co.

[Written across the face:] No report; road under construction.

284 27.

Proper address of the company: William Bailey, pres't & G. M., 3334 Washington Ave., St. Louis, Mo.; principal office of Co., Sheidley building, Kansas City. Headquarters of construction, Clinton, Henry Co., Mo., in charge of F. M. Green, contractor.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

William Bailey, being duly sworn, depose and say that the statements in the foregoing sheets have been prepared by the proper offi-

cers of said company from its books and records; that, to the best of his knowledge and belief, they are correct and do contain a true exhibit of the affairs of said company on the 1st day of January, 1884.

WILLIAM BAILEY,
President Kansas City & Southern R'y Co.

Subscribed and sworn to before me this 17th day of April, 1884.
[SEAL.] A. A. PAXON,
Notary Public.

285 RAILROAD COMMISSIONERS' OFFICE,
CITY OF JEFFERSON, MO., *Nov. 28th*, 1888.

I, Jas. E. McHenry, secretary of the board of railroad commissioners of the State of Missouri, hereby certify that the foregoing is a correct copy of the report of the Kansas City & Southern Railway Company, made to the said railroad commissioners for the year 1883, as the same remains on file in this office.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said board of railroad commissioners at office, in the city of Jefferson, Mo., this day and year above written.

JAS. E. McHENRY, *Sec'y.*

286 Statement of the Kansas City and Southern Railway Company to the railroad commissioners of the State of Missouri for the year ending December 31, 1886 (as required by section 841 of the Revised Statutes of Missouri, 1879).

Filed Aug. 20, 1887.

JAS. E. McHENRY, *Sec'y.*

STATE OF MISSOURI,
OFFICE OF RAILROAD COMMISSIONERS,
CITY OF JEFFERSON.

The forms herewith are furnished in order that there may be entered therein the statement, as required by law, of the affairs of the —— company as the same existed on the first day of January, 188–.

The law requires the said statement to be transmitted to the railroad commissioners on or before the first day of April, 188–.

It is very essential that the information asked for in this form be given as fully as possible, and it is of especial importance that all interrogatories regarding traffic are answered fully and particularly as regards Missouri traffic.

Please return statement promptly.

287 3.

General officers of the company.

Name.	Title of office.	Address.
William Bailey..	Pres't & gen'l manager..	3334 Washington Ave.
F. M. Green.....	Ass't " ..	St. Louis, Mo.; Clinton, Mo.
Dewitt C. Blair..	Secretary.....	Belvidere, New Jersey.
John O'Grady...	Ass't sec'y & gen'l solicitor.	721 Pine St., St. Louis, Mo.
W. B. Kane.....	General f'g't & pass. agent.	Clinton, Mo.

Board of directors.

Name.	Residence.
William Bailey.....	St. Louis, Mo.
John O'Grady.....	"
H. W. Salmon.....	Clinton, Mo.
E. L. Martin.....	Kansas City, Mo.
E. P. Wolf.....	St. Louis, Mo.
P. J. Lingenfelder.....	"
D. C. Blair.....	Belvidere, N. J.
Conrad Miller.....	Blairstown, N. J.
W. H. Vail.....	"

288 4.

Length of Line Operated.

Main lines. From—	To—	State whether owned or leased.	Total length, miles.	Length in Missouri, miles.	Double track. Total In Mo., miles. miles.
Osceola.	East Lynne.	Owned.	61.964.	61.964.	None.

Side tracks. Total miles.	In Mo., miles.
6.392.	6.392.

Total main lines, ——.

Branch lines.

From— To—

None.

Total branch lines, ——.

Total main and branch lines, ——.

289 5.

Capital stock.

Amount of capital stock issued, at rate of 20,000 per mile for each and every completed mile,

First preferred: No preferred stock.

Preferred: None.

Common: As first above given, all being held by contractor's trustees until road is completed.

Par value of stock issued,	See explanation above.
Number of shares issued,	
* Amount of stock paid in,	
* Total number of stockholders,	
Number of stockholders residents of Missouri,	
Amount of stock owned in Missouri,	
Market value of stock Dec. 31, 188–,	No market value.
First preferred,	
Preferred,	
Common,	

* Append list of stockholders, showing name, amount of stock owned, and place of residence as far as known.

* Append list showing by whom paid in. (See Revised Statutes of Missouri, 1879, sec. 841.)

290 6.

Debt.

Funded debt, none.
Total funded debt, $——.
Unfunded or floating debt, none.
Total unfunded or floating debt, $——.
Total debt, $——.

291 7.

Cost of road, equipment, and property.

Cost of construction—main line and branches, $——.
Cost of equipment—main line and branches, $——.
Cost of buildings and fixtures—main line and branches, $——.
Cost of other property, not included in above, $——.
Total cost, construction, equipment, and property, $——.

Values (in Missouri only).

Value of road-bed, including superstructure and bridges—main line and branches.....	$201,884 50
Value of equipment—main line and branches.....	29,950 00
Value of buildings and fixtures—main line and branches	13,100 00
Value of all other property not included in above—main line and branches.....	4,000 00
Total value—main line and branches.....	$248,934 50

Taxes.

Taxes paid in Missouri.

State taxes, $——.
Local taxes, $——.
Total, $——.

292 8.

General balance-sheet, December 31, 188–.

Dr.	Cr.
$——.	$——.

9.

Net income, dividends, etc.

Total net income, $——.
Percentage of same to stock and debt,
Percentage of same to total property and assets,
Interest accrued during the year—
On funded debt, $——.
On other debt, $——.
Dividends declared (—— per cent. per year), $——.
Date of last dividend declared,
Balance for the year or surplus, $——.
Deduct or add entries made in profit and loss account during the year, not included in the foregoing statement.
Surplus at commencement of the year, as changed by aforesaid entries, $——.
Total surplus December 31, 188–, $——.

10.

Table of Monthly Earnings for the Year Ending December 31, 188–.

Months.	Passenger earnings.		Freight earnings.		Earnings from all other sources.		Transportation earnings, all sources.	
	Total earnings.	In Missouri.	Total earnings.	In Missouri.	Total.	In Missouri.	Total.	In Missouri.
January	487 45			1,083 57		1,614 15		
February	500 85			856 94		1,402 25		
March	591 50			525 11		1,384 49		
April	330 08			895 15		1,309 58		
May	385 40			886 88		1,338 66		
June	389 35			666 94		1,483 32		
July	427 83			1,277 00		1,824 92		
August	342 95			612 36		1,077 81		
September	254 00			856 84		1,330 78		
October	188 16			771 73		1,046 05		
November	191 52			939 40		1,210 49		
December	204 50			991 38		1,411 13		
Totals	4,293 59			9,363 70		16,433 63		

It is required that earnings for Missouri be stated separately.

294 11.

Earnings and income, year ending December 31, 188–.

Total earnings, main and branch lines $16,433 63
Income derived from all other sources.....

Total earnings and income, all sources ..... $

Earnings of main and branch lines in Missouri, stating each line separately.

Lines.	Per mile of road.	Per passenger-train mile.	Per freight-train mile.	Per train mile, all trains.	Total.
Main line,	0.44	0.12	0.25	0.37	16,433 63
Branch, ——.					
"					
"					
"					
"					
"					

The above table is intended to show earnings in Missouri only.

295 12.

Expenses.

Total expenses, main and branch lines..... $

Expenses of main and branch lines in Missouri, stating each line separately.

Lines.	Per mile of road.	Per passenger-train mile.	Per freight-train mile.	Per train mile, all trains.	Total.
Main line.....					9,747 36
Branch, ——.					
"					
"					
"					
"					
"					

9,74736

The above table is intended to show expenses in Missouri only.

296 13.

Expenses—Continued.

Amount forward	9,747 36
Salaries of officers	2,000
Amount expended for repairs and renewals	3,480 71

Amount expended for maintenance of way	8,444 88
Amount expended for station-houses, other buildings, and fixtures	301 01
Amount expended for motive power	3,295 93
Amount expended for cars, all kinds	
All other expenditures not included in the above	6,048 96
Total	$33,318 85

297 14.

Movement of passengers and freight.

Miles run by passenger trains during the year.
Miles run by freight trains during the year.
Miles run by all other trains during the year.
Average number of cars in passenger trains.
Average number of cars in freight trains.
Total number of passengers carried during year, 8,312.
Total number of passengers carried during year in Missouri.
Total passenger mileage or passengers carried one mile during year.
Average distance traveled by each passenger, —— miles.
Average amount received from each passenger.
Average rate received per passenger per mile.
Total number of tons of freight carried during year.
Total number of tons of freight carried during year in Missouri.
Total freight mileage or tons of freight carried one mile.
Average haul (miles) per ton of freight.
Average amount received for each ton of freight.
Average amount received per ton per mile.
Proportion of empty cars to loaded cars in freight trains.
Average load of cars in freight trains.
Average number of cars in freight trains.
Average rate per passenger per mile in Missouri.
Average rate per ton of freight per mile in Missouri.

298 15.

Rates During Year in Missouri.

Month.	Freight rates in cents per mile. Through.	Local.	Passenger rates in cents per mile. Through.	Local.	All.
January					
February					
March					
April					
May					
June					
August					
September					
October					
November					
December					

(Append herewith tariff of freights showing changes during the year, and also copy of each published rate of fare for passengers and tariff of freight issued during the year for the governments of the agents of the company; and if rates of fare and tariff of freights are not the same as actually received, state what were received. See section 841, Revised Statutes of Missouri, 1879.)

299 16.

Missouri Tonnage Classified.

Articles.	Tons.	Articles.	Tons.
Wheat		Iron, steel, and castings	
Corn		Iron ore	
Other grain		Zinc ore	
Horses and mules		Lead ore	
Cattle		Pig-iron	
Sheep		Iron blooms	
Hogs		Pig-lead	
Other animals		Spelter	
Other agricultural products		Salt	
Lumber and forest products		Stone	
Soft coal		Brick	
Hard coal		Clay and sand	
Plaster and cement		Agricultural implements	
Lime		Wagons	
Steel and iron rails		General merchandise not otherwise specified	

300 17.

Description of lines.

* Description of lines in Missouri operated by the —— Company.

Miles of steel rails on lines at close of 188–.
Miles of steel rails laid on lines during 188–.
Miles of track ballasted at close of 188–.
Miles of track ballasted during 188–.
Number of new ties put in track during 188–.
Miles of track fenced at close of 188–.
Miles of track fenced during 188–.
Number of highway crossings at grade.
Number of highway crossings over or under railroad.
Number of railroad crossings at grade.
Number of railroad crossings over or under other railroads.
Number of cattle-guards.
Number of open culverts (masonry).
Number of open culverts (wooden).
Number of persons, including officials, regularly employed.
Number of stations.

* This statement to be made out as applying to Missouri only.

Miles of track abandoned or taken up during year.
Miles of side track built during year.
Miles of new track, main line, built during year.
Miles of new double or second track built during year.

Append statement showing any important work done on line during year (in Missouri), such as changes of line, reducing grades, etc.

301 18.

Bridges in Missouri.

On lines operated by the —— Company.

	Total number spans.	Total length.	Built during 188–. Number spans.	Length.
Stone bridges (number only),				
Iron truss,				
Iron girder,				
Iron trestle,				
Combination truss,				
Wooden truss,				
Wooden girder,				
Framed trestle,				
Pile trestle,				
Totals.				

Buildings erected in Missouri during the year by the —— Company.

	Where built.	Brick.	Wooden.
Station-houses,			
Freight-houses,			
Machine shops,			
Blacksmith shops,			
Car shops,			
Engine-houses,			
Car sheds,			
Section-houses,			
Water tanks,			

302 19.

Rolling stock.

Rolling stock used by the —— Company in Missouri.

Locomotives, 4.
Passenger cars, 2.
Dining cars.
Official cars.
Sleeping cars.
Mail, baggage, and express cars, 2.
Box freight cars, 3.

Stock cars.
Refrigerator cars.
Stock cars, double decked.
Platform or flat cars.
Way cars or cabooses, 1.
Coal cars, 60.
All other cars, 14 hand cars.
Total freight cars, all kinds, 64.
Number of locomotives equipped with train brakes.
Number of passenger cars equipped with train brakes.
Number of freight cars equipped with train or automatic brakes.
Number of passenger cars equipped with safety platform and coupling.
Number of freight cars equipped with automatic couplers.

303 20.

Express companies.

State what express companies operate on the lines of the —— Rail— Company, on what terms and conditions, and the kind of business done by them.

The Pacific and Adams Express Companies operate on this line, paying *40%* of their earnings for privilege; do usual business done by Ex. Co.

Freight and transportation companies.

State what freight and transportation companies operate on the lines of the company, and upon what terms and conditions.

None.

Do the said companies use cars of the railroad company or cars furnished by themselves?

21.

Freight and transportation companies—Continued.

What preference is given in speed or order of transportation to the freight or cars of such freight or transportation companies?

Running arrangements with other companies.

State what running arrangements the —— Company has with other railroad companies.

See copy of contract heretofore furnished, marked Exhibit A, being contract with Mo. Pacific for running arrangement over a portion of their line between East Lynne and Harrisonville, Mo. (about 5½ miles).

304 22.

Casualties.

*Casualties in Missouri on lines operated by the —— Company during 188–.

	From causes beyond their own control.		From their own negligence or carelessness.		Total.	
	Killed.	Injured.	Killed.	Injured.	Killed.	Injured.
Passengers,						
Employés	None.					
Others,						
Total.						

* Casualties of a trifling character need not be reported.

What regulations govern your employés in regard to crossings of other railroads, and are they found sufficient?

Usual rules as to stoppage and signals.

Are your regulations in regard to crossings of public highways found to be sufficient?

Yes.

305 23.

STATE OF MISSOURI, } ss:
County of Jackson, }

William Bailey, president of the Kansas City and Southern Railway Company, being duly sworn, depose- and say- that the statements in the foregoing sheets have been duly prepared by the proper officers of said company from its books and records; that, to the best of his knowledge and belief, they are correct and contain a true exhibit of the affairs of said company as the same existed on the first day of January, 1887.

WILLIAM BAILEY.

Subscribed and sworn to before me this 19th day of August, 1887. My term expires December 31, 1890.

R. J. INGRAHAM,
Notary Public, Jackson County, Missouri.

306 RAILROAD COMMISSIONERS' OFFICE,
CITY OF JEFFERSON, Mo., *Nov. 28th*, 1888.

I, Jas. E. McHenry, secretary of the board of railroad commissioners of the State of Missouri, hereby certify that the foregoing is a correct copy of the report of the Kansas City & Southern Railway Company made to the said railroad commissioners for the year 1886 as the same remains on file in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said board of railroad commissioners, at office, in the city of Jefferson, Mo., this day and year above mentioned.

[SEAL.] JAS. E. McHENRY, *Sec'y.*

307 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners in Firm Name of Naylor & Co., Plaintiffs,
vs.
KANSAS CITY AND SOUTHERN CONSTRUCTION COMPANY, Defendant, and Kansas City and Southern Railway Company, Interpleader.

The above-named defendant and interpleader and their attorneys of record are hereby notified that the depositions of said Sebastian Schlesinger, Berthold Schlesinger, and J. M. Clark, witnesses on behalf of said plaintiffs, will be taken on behalf of said plaintiffs at the office of Messrs. Naylor & Co, No. 99 John St., in the city of New York, in the county and State of New York, on the 20th day of April, 1885, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, and that the taking of said depositions, if not completed on that day, will be continued from day to day at the same place and between the same hours until completed, which depositions will be read in evidence on the trial of the above-entitled cause and of the interpleader therein.

GARDINER LATHROP,
JEFFERSON BRUMBACK,
Att'ys for Pl'ff.

308 I hereby certify that on the 17th day of April, 1885, at the city of New York, in my district, I personally served the within notice on the within-named Kansas City and Southern Construction Company, defendant, by exhibiting to George B. Ripley, secretary of said company, the within original and at the same time leaving with him a copy thereof.

Dated April 17, 1885.

JOHN B. ERHARDT,
United States Marshal, Southern District of New York,
By GEORGE JEFFERY,
Dep. U. S. Marshal.

Edward J. Jones, notary public and commissioner for all the States and Territories and the British Provinces of Ontario and Nova Scotia, 61 Court St., Boston, Mass.

COMMONWEALTH OF MASSACHUSETTS, } *ss:*
County of Suffolk, City of Boston, }

Be it remembered, and I hereby certify, that on the seventeenth day of April, in the year of our Lord one thousand eight hundred and eight--five, before me, Edward J. Jones, a commissioner for the State of Missouri, residing in said city, county, and Commonwealth, duly appointed, commissioned, and authorized by his excellency the governor of the State of Missouri to administer oaths, affirmations, &c., and to take acknowledgment and proof of the execution

of deeds and other instruments in writing, under *or* seal or not, to be used in the several courts or recorded in the State of Missouri,
personally appeared at my office, in said Boston, William D.
309 Martin, a deputy sheriff of said county of Suffolk, and personally known to me to be the same officer who has made — of his official service of the annexed notice, who, being first duly sworn by me in due form, as required by the State of Missouri, did solemnly depose, delare, and say that the matters and things set forth in said return of his official service of said notice by him subscribed in my presence are all true in every particular, as therein stated.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the city of Boston, county and Commonwealth aforesaid, on the seventeenth day of April, in the year of our Lord eighteen hundred and eighty-five.

EDWARD J. JONES,
[SEAL.] *Commissioner for the State of Missouri.*

Edward J. Jones, notary public and commissioner for the District of Columbia and all the States and Territories and the British Provinces of Ontario, New Brunswick, and Nova Scotia, 61 Court street, Boston, Mass., U. S. A.

UNITED STATES OF AMERICA,
Commonwealth of Massachussetts, County of Suffolk, } *ss:*
City of Boston,

Be it remembered, and I hereby certify, that on the seventeenth day of April, in the year of our Lord one thousand eight hundred and eighty-five, before me, Edward J. Jones, Esquire, a notary public in and for said county of Suffolk, residing and practising in said city, county, and Commonwealth, duly appointed, commissioned, and authorized by his excellency the governor of the Commonwealth of Massachusetts, under the laws of said Commonwealth, to declare, enter, and record protests, to administer oaths and affirmations, &c., and to take acknowledgment of the proof of the execution of deeds and other instruments in writing, under seal or not,
310 to be used in the several courts or recorded in said Commonwealth of Massachusetts or elsewhere, personally appeared at my office, at the city of Boston, William D. Martin, personally known to me as a deputy sheriff of said county of Suffolk and the same officer who has made return of the service of the annexed instrument, personally known to me, who, being first duly sworn by me, did solemnly depose, declare, and say that the matters and things set forth in his return of service of the annexed instrument, by him subscribed in my presence, are true of his own personal knowledge, information, and belief; and I further certify that I carefully read over and explained to said deponent the full meaning and effect, legal purpose, and intent of his said return, and he acknowledged and declared hiss full and complete understanding of all the matters and things contained in said return, and upon his oath declared they are all true in every particular as therein named and set forth.

In witness whereof I have hereunto set my hand and notarial seal, at my office, in the city of Boston, county and Commonwealth aforesaid, on the seventeenth day of April, in the year of our Lord eighteen hundred and eighty-five.

EDWARD J. JONES,
[SEAL.] *Notary Public for said Suffolk County.*

311 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners in the Firm Name of Naylor and Co., Plaintiffs,
vs.
KANSAS CITY AND SOUTHERN CONSTRUCTION COMPANY, Defendant, and Kansas City and Southern Railway Company, Interpleader.

The above-named defendant and interpleader and their attorneys of record are hereby notified that the depositions of the said Sebastian Schlesinger, Barthold Schlesinger, and J. M. Clarke, witnesses on behalf of said plaintiffs, will be taken on behalf of said plaintiffs at the office of Messrs. Naylor & Co., No. 99 John street, in the city of New York, in the county and State of New York, on the 20th day of April, 1885, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, and that the taking of said depositions, if not completed on that day, will be continued from day to day at the same place and between the same hours until completed; which depositions will be read in evidence on the trial of the above-entitled cause and of the interpleader therein.

GARDINER LATHROP,
JEFFERSON BRUMBACK,
Att'ys for Pl'ff.

Exhibit 2. Henry P. Butler, U. S. commissioner. Apr. 25, 1885. H. P. B., comm'r.

312 Service of the above notice is hereby acknowledged and issue of dedimus, commission, and all exceptions as to time waived.

April 8, 1885.

JOHNSON & LUCAS,
Att'ys for Kansas City & Southern Railway Co., Interpleader.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

BOSTON, *April 17th*, 1885.

I this day served the within notice upon the within-named Kansas City and Southern Construction Company by delivering to and leaving with James I. Brooks, the president thereof, an attested copy of said notice.

WM. D. MARTIN,
Deputy Sheriff.

313 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

Be it remembered that on this 20th day of April, 1885, I, Henry P. Butler, a commissioner of the circuit court of the United States for the southern district of New York, duly appointed commissioner and qualified as such, did, under and by virtue of the several acts of Congress authorizing and regulating the taking of depositions *de bene esse* in civil causes depending in the courts of the United States, cause to come before me, at the office of Messrs. Naylor & Co., No. 99 John street, in the city of New York, in the county and State of New York, and between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of said day, the following person, to wit, Sebastian Schlessinger, to be examined as a witness in a cause pending in the circuit court of the United States for the western division of the western district of Missouri, wherein Berthold Schlesinger and Sebastian Schlessinger are plaintiffs and The Kansas City and Southern Construction Company defendants and Kansas City and Southern Railway Company interpleader.

Attendances: Geo. Putnam, Esq., att'y for plaintiffs; Messrs. John O'Grady and Sutherland Tenney, for said railway Co.

314 And the said SEBASTIAN SCHLESINGER, of lawful age, being by me cautioned and sworn to testify the whole truth, and carefully examined, deposeth and saith:

1st Int'y. What is your name, age, occupation, and place of residence?

A. Sebastian B. Schlesinger; forty-seven; merchant; and reside in Beverly Farms, Massachusetts.

2d Int'y. Were you in the year 1880 a member of the firm of Naylor & Co.; and, if so, who composed said firm?

A. I was a member of said firm, and it was then composed of Bartho-d Schlesinger and myself. I refer to the firm in Boston.

3d Int'y. Did you on behalf of the Boston firm of Naylor & Co. have any dealings with the Kansas City and Southern Construction Company in regard to the purchase of steel rails by said company? If yea, state what said dealings were.

A. I had dealings with the Kansas City and Southern Construction Company. I sold them on behalf of said firm five thousand tons of steel rails.

4th Int'y. Please examine the paper handed you by the commissioner and marked Exhibit A., H. P. B., commissioner, Ap'l 20, 1885, and state what it is and whose signature is appended thereto.

A. It is a contract for the purchase of five thousand tons of steel rails, signed by James I. Brooks, treasurer of said construction company, and I request that the same may be attached to my deposition as an exhibit.

Counsel for the defendant, The Kansas City and Southern Railway Company, objects to the exhibit for incompetency and because the signature thereto has not been identified and because the plaintiffs herein have never signed the same.

315 5th Int'y. State whether at the time of the execution of the contract "Exhibit A" a duplicate was executed by you on behalf of Naylor & Co., the plaintiffs; and, if yea, what was done with it?

Objected to by counsel for the railway company for incompetency and irrelevancy and because the paper itself is the best evidence and that no notice has been given for the production thereof.

A. It was and is in their possession.

6th Int'y. State whether or not you are familiar with the signature of James I. Brooks, who you say signed the said contract "Exhibit A;" and, if yea, whether the said signature is in his handwriting.

A. I am familiar with it, and it is.

7th Int'y. State what, if anything, was done by Naylor & Co. on account of the contract Exhibit A.

A. Five thousand tons of rails were purchased abroad.

8th Int'y. When, of whom, and at what price?

Counsel for the railway company desires to enquire whether the contracts made by Naylor & Co. for the purchase of the 5,000 tons was in writing, and the witness replied that it was and the contracts are in Europe.

Counsel for the railway company objects to the 8th Int'y, unless the written contracts in reference to the purchase of that 5,000 tons is produced and attached to this deposition.

A. I cannot give the exact date; it was in the year 1880, and made of the Blaenavon company at 18.17, free on board in Wales.

9th Int'y. Can you state about how soon after the making
316 of the contract with the construction company the purchase in England to meet it was made?

A. Immediately after.

10th Int'y. State what, if any, rails were received in New York by you on account of that contract, and about when they arrived.

A. There were fourteen hundred tons received; they arrived in about June—June or August—during the summer season of 1880.

11th Int'y. Were any of those rails accepted and paid for by the construction company?

A. No.

12th —. State why, if you know, the construction company did not receive and pay for those rails.

Objected to by counsel for the railway company as incompetent, irrelevant, and asking for a conclusion of the witness.

A. Because they said they did not wish to put up any more money; they could not pay for the rails, nor could they put up sufficient money to induce me to carry them for them.

13th Int'y. State what, if any, negotiations you had with the construction company in relation to those rails.

Objected to by counsel for the defendant railway company for incompetency, irrelevancy.

A. The construction company tried very hard to induce me to cancel the contract, but, the market having declined very much in price, the difference was so great that it would require a considerable sum of money for them to raise in order to pay the difference; they then wanted me to sell the rails and gave me an order on May 18th, 1880, to sell them.

14th Int'y. Please examine the paper marked Exhibit "B" and state in whose handwriting it is. State whether you saw it signed and whose signature it is.

317 The COMMISSIONER:

Int'y. You request that this exhibit be attached to your deposition and marked Exhibit B?

A. Yes.

A. It is my handwriting and was signed in my presence by Mr. Brooks.

15th Int'y. Is that the order referred to in your last previous answer?

A. Yes.

16th Int'y. What did you do in pursuance of that order?

A. I immediately tried in every direction to sell the rails.

17th Int'y. State whether you did sell them or not.

A. I sold 3,530 tons to Mr. Thomas Nickerson at six pounds fifteen shillings, free on board, sixty days.

Mr. O'GRADY: I object to your refreshing your memory from that memorandum.

18th Int'y. Free on board where?

A. Wales.

19th Int'y. Please examine the paper marked "Exhibit C" and state whether that is the contract with Mr. Nickerson by which you sold him the 3,530 tons of rails.

The witness requests that this Exhibit C be attached to his deposition and used in evidence.

Counsel for the defendant railway company objected to the question as incompetent and leading and asking for a conclusion of the witness.

A. That is the contract; that is a fac-simile of it.

318 20th Int'y. Please examine the signatures and state whose the signatures are.

A. That is my signature and Mr. Nickerson's signature.

21st Int'y. Did you see it signed by Mr. Nickerson?

A. Whether I saw it I cannot now swear to.

22d Int'y. Do you know his handwritiug?

A. I know his handwriting, but whether I saw him sign it I cannot swear to.

23rd Int'y. You state that that is a fac-simile. State how it is made.

A. It is a press copy of the original.

24th Int'y. Do you know where the original is?

A. No; but it is undoubtedly in Boston. Mr. Nickerson has one.

25th Int'y. This is a duplicate of the original?

A. It is a press copy.

Counsel for defendant railway company objects to the admission of Exhibit "C" for incompetency, irrelevancy, and because a press copy is not the original.

26th Int'y. Will you state whether the original of which that is a press copy was written by you or handed to Mr. Nickerson, or do you know?

A. That I do not know; I cannot tell. I will swear to it that it is the correct contract.

27th Int'y. You have said the 3,530 tons were sold to Mr. Nickerson free on board in Wales. Please state, if you know, what would have been the cost, in addition to that sum, of delivering those rails in bond in New York.

Counsel for the defendant railway company objects to the question as incompetent, irrelevant, and immaterial.

319 A. About thirteen shillings and six pence freight and nine-sixteenths of one per cent. insurance, besides loss of interest and possibly a broker's commission.

28th Int'y. Now state what was done with the 1,470 tons which came to this country.

A. 300 tons were sold at sixty-four dollars and fifty cents, New York, duty paid; 950 tons at sixty dollars; 220 tons at sixty-four dollars.

29th Int'y. State whether an account of these sales was rendered to the Kansas City and Southern Construction Company by you.

Objected to by counsel for the defendant railway company for incompetency and irrelevancy because the account itself is the best evidence; because no notice has been served on the Kansas City and Southern Construction Company to produce said account.

A. A full account has been rendered to the Kansas City and Southern Construction Company.

30th Int'y. Please examine the paper marked Exhibit "D" and state what it is.

The witness asks that the paper marked Exhibit D be attached to his deposition as an exhibit.

Objected to by counsel for defendant railway company as incompetent, irrelevant, and immaterial because no foundation has been laid for the introduction of this paper.

A. It is a copy of an approximate statement of account, not including interest, of the purchase *of* the Kansas Construction Company and the sale, for their account, of 5,000 tons steel rails.

31st Int'y. What was done with the original of that account?

A. It was rendered the Kansas City and Southern Construction Company.

320 32nd Int'y. By whose direction was that copy made?

A. By my own.

33d Int'y. In whose handwriting is it?

A. One of my clerks.

34th Int'y. Please explain the two charges of one per cent. brokerage on nine hundred and fifty tons and two hundred and twenty tons.

A. I had better begin on the 3,530 tons. I sold those, and therefore charged no brokerage. The others I did not sell myself, but sold them through brokers to, whom I had to pay one per cent. brokerage.

35th Int'y. There is a charge of five per cent. commission and *del credere*. Please explain that charge, Mr. Schlesinger.

A. I guaranteed the sales, and while I sold rails I did not agree to resell and guarantee the sale. It is a fair commission; it is a usual commission, because it is not usual to sell rails and then resell then for account of the buyer.

36th Int'y. The next item, Mr. Schlesinger, is a charge of forty-one thousand one hundred and sixty dollars duty. Please state what that is and how it *it* is made up.

A. It is a duty of twenty-eight dollars per ton on fourteen hundred and seventy tons of rails, which were sold at a duty-paid price, and this duty has been paid to the United States Government.

37th Int'y. What was the duty on steel rails at that time?

A. Twenty-eight dollars per ton.

38th Int'y. Was that duty in fact paid?

A. I said so; it was paid to the United States Government. We could not have got the rails if it had not been.

321 39th Int'y. State whether, in your judgment, the prices which you obtained for the rails sold to the Kansas City and Southern Construction Company and afterwards sold by you on their account were fair prices.

Counsel for the defendant railway company objected to the question as being incompetent, irrelevant, and immaterial.

A. They were not only fair prices, but they were very high prices and not a single sale could have been repeated. They were very high prices in view of the constantly declining market. They were especially high prices in view *od* the constantly declining market.

40th Int'y. How much did the construction company pay you on that contract?

A. Fifty thousand dollars.

41st Int'y. When was that paid?

A. It was paid before I would undertake the shipment of any large quantity of rails at the high price which we were forced to pay for them, because at that time they desired them very promptly; and their organization seemed not wholly completed and it was im-

possible to hold any single individual liable for the full and faithful performance of the contract.

42d Int'y. Can you state whether or not it was all paid before the order to sell again—the fifty thousand dollars?

A. Yes; it was. To the best of my recollection it was paid before then.

322 And in X examination he saith:

Cross-examination by JOHN O'GRADY, Esqr., att'y for railway company, int'pl'r:

43 Int'y. Did you have any other contract in writing with the construction company for the purchase of the five thousand tons of rails except the written contract introduced in evidence and marked Exhibit "A"?

A. I do not think I had a contract, but, as far as I remember, before I could close the contract with them they made me an offer as to price at which they would purchase, which I had to cable over to London; but this is the only *bona fide* contract for the purchase of rails.

44th Int'y. This is the only contract you had with the company?

A. The only contract.

45 Int'y. Was there afterwards any supplementary contract made between you and the construction company in reference to the delivery of the five thousand tons of rails spoken of?

A. The only contract made since was for the sale of the rails, not for the purchase.

46th Int'y. Now, do you know anything as to the authority of Mr. Brooks to enter into this contract?

A. I know that the contract was made by Mr. Brooks, not alone, but by Mr. Brooks and Mr. Parker and Mr. Nelson, and the latter two gentlemen brought Mr. Brooks forward as the authorized person to make the contract.

47th Int'y. That is the only knowledge you have as to Mr. Brooks' authority to make this contract?

A. Yes, and his own representations, of course.

323 48th Int'y. When did you make this contract and with whom in Europe for the delivery of the five thousand tons of rails?

A. The contract in Europe was made with the Blaenavon Company immediately after a cable sent from here announcing the sale was received?

49th Int'y. Was that contract in writing?

A. It was; presumably it was, because all our contracts are in writing.

50th Int'y. Did you at that time contract for five thousand tons or for a greater or less quantity than five thousand tons?

A. Contracted for five thousand tons.

51st Int'y. To fill this identical order?

A. To fill this identical order.

52d Int'y. Do you know whether those rails were ever made?

A. They were all made.

53 Int'y. Did you see them made?

A. No.

54 Int'y. What knowledge had you that those rails were made?

A. The knowledge that I sold thirty-five hundred and thirty tons to Mr. Nickerson which were made to his pattern and the fourteen hundred and odd tons which came over here and were sold by me.

55th Int'y. You say that they were made to Mr. Nickerson's pattern?

A. Yes.

56th Int'y. How did that happen—that they happened to be made to Mr. Nickerson's pattern?

A. Because when we take a contract for five thousand tons we don't roll the whole five thousand tons right off. All rails are always contracted for subject to certain sections, and when

324 they could not receive a portion of the rails, and I wanted to sell them. It would have been very dangerous to have made them all to their pattern, because it would have made the selling so much more difficult, but we were none the less bound to take the rails. The pattern was similar to others—in fact, almost identical or very nearly so. I am not certain whether it was 50 or 56 pounds.

57th Int'y. Do you know what road these rails were used on? Were they used in the construction of the Atchison, Topeka and Santa Fé road?

A. They were used on the Sonora road, as far as I know and to the best of my knowledge and belief.

58 Int'y. Then the thirty-five hundred and thirty tons that you sold to Mr. Nickerson were not rolled for the construction company, for the Kansas City and Southern Construction Company; they were not rolled for that company?

A. They were only rolled after I had resold them for account of the Kansas City and Southern Construction Company.

59th Int'y. They were rerolled?

A. They were not rerolled. They were rolled after I had sold them for account of the Kansas City and Southern Construction Company.

60th Int'y. How long after you sold these rails to Mr. Nickerson were they rolled for the Sonora road or for him?

A. I cannot tell from memory.

61st Int'y. Can you approximate the time?

A. If you let me look at Mr. Nickerson's contract that will probably tell. (Witness looks at contract.) They were rolled in time to be delivered in accordance with the delivery required in "Exhibit C."

325 62d Int'y. Will you be kind enough to specify the time as nearly as you can?

A. One-half in June, 1880, and the balance as early as possible or not later than August 15th, 1880.

63d Int'y. Then at the time the Kansas City and Southern Con-

struction Company surrendered and cancelled this contract none of the rails were rolled at all in Europe?

A. Thirty-five hundred and thirty-two of them were not rolled.

64th Int'y. Were not rolled?

A. Thirty-five hundred and thirty-two of them were apparently not rolled.

65th Int'y. How long after the construction company surrendered its contract was it before you made the contract with Mr. Nickerson?

A. The construction company never surrendered its contract, for I never allowed them to do so. They authorized me on May 18th to sell the rails for their account, and those rails which had been rolled to their pattern I brought over here and sold, and the rest which I sold to Mr. Nickerson I had rolled to his pattern and sold them delivered on the other side.

66th Int'y. When did you receive that authority from the Kansas City and Southern Construction Company?

A. It is in the exhibit May 18th.

67th Int'y. When did you make the contract with Mr. Nickerson?

A. I had to have their authority before I could make the contract with Mr. Nickerson.

68th Int'y. Then the surrender and cancellation of the contract made with the Kansas City and Southern Construction Company and the purchase of these rails by Mr. Nickerson were all
326 made on the same day?

A. To have cancelled the contract would have cost the construction company fifteen shillings per ton more than the price per ton by reselling. Therefore it was not a question of cancelling, but a question of reselling.

69th Int'y. The only rails that you resold on account of the Kansas City and Southern Company was the excess over the rails you sold to Mr. Nickerson, is it not?

A. No; I sold the whole five thousand tons for account of the Kansas City and Southern Construction Company because the price at which I had sold the Kansas City and Southern Construction Company.

70th Int'y. If you never manufactured the rails nor had the rails manufactured for construction company how did you sell the rails on account of the construction company if you never had them manufactured in accordance with the specifications of the construction company?

Objected to as involving a question of law.

A. The manner of buying rails is to buy a certain quantity for delivery at certain intervals and of a section within a certain limit or limits of weight. The contract with the Kansas City and Southern Construction Company provided for rails to be delivered at the rate of twelve hundred and fifty tons monthly, beginning in April. They very soon afterwards wanted the delivery delayed. It is not customary to roll rails before delivery is wanted or before shipment is required. Therefore, although we have a contract with the

Blaenamon company obliging us to take five thousand tons of rails at eight pounds fifteen shillings, we did not specify the section for delivery any faster than the rails were required; hence, in reselling for account of the construction company, we had liberty to
327 give them Mr. Nickerson's section instead of their own.

71st Int'y. You have sold this account, have you not?

A. That is a question I do not understand.

72nd Int'y. Have you sold the account on which suit is brought?

Objected to as immaterial.

A. Yes; I have sold it.

73rd Int'y. To whom have you sold it?

A. I sold it to a Mr. Sargent, in Boston.

74th Int'y. How much did you get for it?

Objected to.

A. I sold it for four thousand dollars.

75th Int'y. Have you got your money?

A. Yes.

76th Int'y. Then you have no interest in this suit or the firm of which you are the head no interest in the suit?

A. The firm who are interested in this suit has liquidated and is no longer in existence, and that was my principal reason for selling it.

77th Int'y. What is Mr. Sargent's name?

A. I don't remember.

78th Int'y. Where does he live in Boston?

A. I don't know.

79th Int'y. Ever had any acquaintance with him before or after you sold it?

A. No.

80th Int'y. How did he pay for it; by check or cash?

A. Check.

81st Int'y. On a place in Boston?

A. Yes.

328 82d Int'y. Do you know by whom the check was signed?

A. I could not swear to it by whom it was signed. I think I remember by whom it was signed.

83d Int'y. What is your best recollection?

A. I think it was signed by Mr.——

84th Int'y. Merriam?

A. Merriam; yes.

85th Int'y. Treasurer of the Missouri, Fort Scott and Gulf railroad?

A. I really do not know.

86th Int'y. Do you remember Mr. Merriam's first name?

A. Charles Merriam.

87th Int'y. Was it his own personal check or the check of a corporation?

A. I do not know.

Q. With whom did you make the negotiations?

A. Mr. Putnam.

89th Int'y. The counsel present?

A. Yes.

90th Int'y. Who pays Mr. Putnam for appearing here?

A. I do not know.

92d Int'y. You do not pay Mr. Putnam—he is not your attorney in this case?

A. No.

93rd Int'y. Do you know whose attorney Mr. Putnam is; whether he is Mr. Sargent's, Mr. Merriam's, of the Fort Scott & Gulf railway?

A. I don't know.

94th Int'y. Do you know who Mr. Putnam, the counsel here present, represents in this case?

329 Objected to as involving a question of law, as immaterial, irrelevant, and as a part of the defendants' case and not legitimate on cross-examination.

A. I have already stated that Mr. Putnam is not representing me in the matter and as to all the various parties whom he is representing I have no knowledge.

95th Int'y. This is a suit in which Naylor and Company is plaintiff and Kansas City and Southern Construction Company and The Kansas City and Southern Railroad Company are the defendants. Now, do I understand you to say that Mr. Putnam in this case does not represent nor is not employed by Naylor and Company, the plaintiffs?

A. He is not employed by Naylor and Company.

96th Int'y. You say that the thirty-five hundred and thirty tons that you sold to Mr. Nickerson was never manufactured or rolled for the Kansas City and Southern Construction Company.

A. I say that those thirty-five hundred and thirty tons were sold by the Kansas City Construction Company to Mr. Nickerson through me. They were their property.

97th Int'y. They were not rolled for the use of the company? The- were not rolled in accordance with the specification given you by the Kansas City and Southern Construction Company?

A. No.

98th Int'y. They were not rolled in accordance with those specifications?

A. They were rolled in the manner already designated by me.

99th Int'y. How long had you been in negotiation with Mr. Nickerson for the sale of this thirty-five hundred and thirty tons?

A. Oh, I don't remember.

330 100th Int. Cannot you fix the time?

A. I was constantly negotiating with Mr. Nickerson for rails because I sold him many more rails than these thirty-five hundred and thirty tons.

101st Int. You sold at about that time a large quantity of rails to Mr. Nickerson?

A. Yes.

102 Int. Can you approximate how much you sold during the year 1880?

A. A good many thousand tons.

103 Int. Ten thousand tons altogether, or over?

A. I should think so, at least.

104th Int'y. Well, can you fix any time definitely how long you were negotiating with him for the sale of this thirty-five hundred and thirty tons of rails?

A. I do not think I was very long because I remember that in order to get the rails of this quality and to have them shipped promptly they paid me an extra price.

105th Int'y. How long do you think you were negotiating? Were you a week?

A. I cannot remember.

106th Int'y. How many days can you fix definitely? How did you negotiate—was your negotiation done by writing or personally?

A. Personally, by me.

107th Int'y. Personally, by you? Where did the transaction occur?

A. At Boston, at Mr. Nickerson's office.

108th Int. Did it take more than two days?

A. It usually takes much longer than that to sell Mr. Nickerson any rails.

331 109th Int. Did it take 10 days?

A. I should say that was a fair guess.

110 Int. It certainly took more than three or four days, did it not?

A. It always takes a number of days before Mr. Nickerson makes up his mind.

111th Int. Well, have you any date or memoranda, from which you can refresh your memory, to show about the number of days that passed during the time of these negotiations for the sale of these thirty-five hundred and fifty tons of rails?

A. I have not.

112 Int. You are certain it was more than four days?

A. I am not certain of anything about it.

113th Int. What is your impression?

A. I have already given that.

114th Int'y. Can't you be kind enough to give it again?

A. It usually takes several days with Mr. Nickerson. I stated he paid me an extra price for the purpose of getting this quality of rails and getting the rails promptly. He wanted some rails for prompt shipment.

115th Int. Then you canno- fix the number of days, but it was certainly two or three days in any event?

A. I can only repeat that I have been in the habit of going constantly to Mr. Nickerson and negotiating with — for rails, but no negotiation amounts to anything until the contract is made.

116th Int. These negotiations were going on some time before the contract was signed, were they not?

A. Negotiations for rails have been constantly going on.

332 117th Int. The negotiations for the thirty-five hundred and thirty tons of rails were going on for some days prior to the time when the contract was signed?

A. Undoubtedly.

118th Int. Now, how does it come that you charge freight in this account of twenty-three hundred and eighty-two pounds fifteen shillings?

A. Because I sold fourteen hundred tons of rails at sixty-odd dollars per ton, which means freight and duty and all charges paid. Before I could get possession of those rails I had to pay the freight and duty. In the case of Mr. Nickerson I sold them free on board and he paid his own freight.

119th Int. Did Mr. Nickerson pay the freight on thirty-five hundred and thirty tons?

A. He did, and there was no charge of freight on any account for this.

120th Int. What is this twenty-three hundred and eighty-two pounds fifteen shillings for?

A. That is in order to make up the account on a dollar instead of a sterling basis. The sale to the Kansas City and Southern Construction Company having been made at a dollar price in bond, I had to add to the rate of freight at a sterling price. If I had sold them at a sterling price I would have added no freight.

121st Int. Then, as a matter of fact, you charged here twenty-three hundred and eighty-two pounds fifteen shillings for freight which was never paid by you?

A. That is not the correct way to put it.

333 122nd Int. Is not that the fact, though?

A. No.

123d Int. You charge in this account an item of twenty-three hundred and eighty-two pounds fifteen shillings freight on thirty-five hundred and thirty tons of steel rails, do you not?

A. Yes.

124th Int. Is not that the fact?

A. My account explains itself.

125th Int. Is not that the fact that you charge here twenty-three hundred and eighty-two pounds fifteen shillings as freight on thirty-five hundred and thirty tons of rails sold to Mr. Nickerson?

A. Yes. I cannot, in making up a dollar account based on a price that includes freight—I must take that rate on both sides—that is to say, it is only a subject of account, and it makes no difference whether I pay the two thousand pounds or not. I have not in my account asked the Kansas City and Southern Construction Company to pay them. I merely charge them with the difference as between the amount which I have received and the amount which they owed me. I have not asked them to pay me two thousand pounds freight, so it is irrelevant, the question, really.

126th Int. You have charged it here, have you not?

A. No, I have not charged it to them. I merely had to make it up to make a difference. I have not charged them with the freight; on the contrary, I have credited them with it.

127th Int. When did you make the assignment of this claim to Mr. Sargent, at what time?

A. I do not remember the exact day. I really don't.

128th Int. Can you fix it? Perhaps Mr. Putnam can.

334 By Mr. PUTNAM:

129th Int. It was within a year, Mr. Schlesinger?

A. Yes.

By Mr. O'GRADY:

130th Int. Within a year?

A. Yes.

131 Int. Now, you say there is three hundred tons of these rails sold at sixty-two dollars and a half New York; to whom did you sell those?

A. Those were sold to the St. Johnsbury and Lake Champlain railroad.

132 Int. When?

A. June, 1880.

133d Int. Who sold them?

A. I really don't remember now.

134th Int. Did you sell them?

A. No; I did not personally sell them. A portion of these rails were sold through brokers, as the account shows.

135th Int. Do you know of your own knowledge how much you received for those rails?

A. Why, this my account states and when it was received.

136th Int. Independent of your account have you any personal knowledge of what you received?

A. My account is my personal knowledge. I have no knowledge beyond that.

137th Int. Have you knowledge beyond this account?

A. No; I do not understand that. I sold them at that price.

138th Int. You say you do not remember about when they were sold?

335 A. Yes; I think it was in June, 1880.

139th Int. You did not sell them yourself?

A. No; I did not sell any rails myself personally.

140th Int. You do not know how much you received for these rails except what you received from the broker—the price you received?

A. But I don't receive money from a broker. A broker merely gets his brokerage. I am willing to swear to it that those were the correct amounts which we did receive.

141st Int. Do you know or have you any knowledge outside of the figures in this account—have you any personal knowledge out of this account what was the price received for those rails?

A. No personal knowledge that would strengthen the fact of those prices.

142d Int. Independent of this account which is here presented in

evidence and marked Exhibit D have you any personal specific knowledge of the sale of those three hundred tons of rails and the price at which they were sold?

Objected to as assuming that the witness has previously testified that his knowledge was based on the account.

A. I can only swear that the facts as represented in that account are true.

143d Int. Is that all?

A. That is all.

144th Int. Do you remember of your own personal knowledge at this time of the circumstances surrounding the sale of the three hundred tons charged in this account at sixty-two and one-half dollars?

A. I repeat the answer just made to the preceding question.

Mr. O'GRADY: I respectfully submit that that is no an-
336 swer. I shall insist upon a clear and definite answer to the question as propounded.

A. I do not carry personal knowledge of every transaction in my business about with me, but can only repeat that the facts stated in my account are true.

145th Int. Then, as I understand you to say, you have no personal knowledge now of these transactions, and you merely rely on the information embodied in this account on which to predicate your testimony?

Objected to as assuming that the witness has denied knowledge when in fact he has only denied memory.

A. Personal knowledge which I had and could have sworn to in 1880 I can hardly swear to in 1885.

146th Int. Then, as I understand you to say, you now have no personal knowledge of this item of three hundred tons except what appears on the face of this paper?

A. I have no practical knowledge to all intents and purposes. I object to swearing to personal knowledge of transactions that occurred five years ago. But I do not deny knowledge of them.

147th Int. This paper introduced in evidence and marked "Exhibit D" is not in your handwriting?

A. No.

148th Int. In whose handwriting is it?

A. One of my clerks.

149th Int. Is the clerk now in your employ?

A. No.

150th Int'y. How long since he left it?

A. He left it when the firm liquidated.

151st Int. When was that?

A. December, 1884.

337 152d Int. Speaking of the firm liquidating, you are now a merchant doing a very large business in New York and Boston?

A. Yes; in New York, not in Boston.

153d Int. In New York?

A. Yes.

154th Int. You are not out of business?

A. I am not out of business.

155th Int. Although the original firm has gone into liquidation, you are yet doing business under the same name, Naylor and Company, the head of your firm, the name, Naylor.

A. No Naylor. Mr. Naylor died many, many years ago.

156th Int. But the suit in Kansas City is brought in the name of Naylor & Co., and the head of your large commercial establishment is given Naylor?

A. Yes.

157th Int. Then, although the firm of Naylor & Co. — in business in 1880, the same members of the firm are now in business and do a very large commercial business in iron; in 1882 you and your brother composed the firm of Naylor & Co?

A. In Boston.

158th Int. You and your brother are the plaintiffs in this suit?

A. Yes.

159th Int. How did it come that you sold a claim of thirty-nine thousand odd dollars and interest from 1880 if you are in actual business for four thousand dollars? Did you regard the claim as good or doubtful?

Objected to as immaterial.

A. My brother wanted me to sell it.

338 160th Int. If your brother wanted you to sell it or any other good claim at such a sacrifice as that would you have done so?

A. My brother was a senior partner and I was a junior partner, and if my brother had said so I would have been obliged to have done so.

161st Int. Did you sell any other large claims about that time at such a sacrifice?

A. I do not remember.

162d Int. Do you ever remember of having sold a similar large claim at such a sacrifice during the time you have been in business either with your brother or with other parties?

A. My personal knowledge is here again at fault. I don't remember.

163d Int. Now, in reference to the nine hundred and fifty tons sold at sixty dollars a ton, to whom did you sell that?

A. That was sold to the firm of Mendey & Co. for a Southern railroad.

164th Int. Did you sell these?

A. No.

165th Int. Sell it through a broker?

A. I did not sell it through a broker unless brokerage was charged for it.

Mr. PUTNAM: I know brokerage is charged for it.

WITNESS: Then I did sell it through a broker.

166th Int. You have no recollection of that sale?

A. No.

167th Int. You have no personal recollection of the price except what appears in this account?

339 A. No.

168th Int. You know nothing about it except what appears in this account now?

A. No.

169th Int. Now, take the two hundred and twenty tons sold at sixty-four dollars per ton, to whom was that sold?

A. I think it was sold through Sherburne and Company, Boston, to the Whitefield and Jefferson railroad.

170th Int. Was that sold through a broker?

A. Yes; I think so.

171st Int. Did you know anything about the sale except what appears on this paper now—any personal knowledge?

A. I think I had some talk with Mr. Sherburne about it, and I remember trying my best to get the highest possible price for these rails, because I knew the Kansas Construction Company was unable to respond to a claim I would have upon them, and therefore all those in Naylor & Company's employ tried their best to get the highest price for the rails obtainable for the construction company.

172d Int. You have no personal knowledge of it? You do not recollect, do you?

A. I will again repeat my memory of five years ago is not sufficiently distinct for me to swear to personal knowledge.

173d Int. It is just the same as the preceding item. Your memory is about the same as for the preceding item of nine hundred and fifty tons.

A. No; it is a little more, because the rails sold there I had personal charge of and personally more to do with.

174th Int. You have got an item charged here of seven hundred and eleven dollars for brokerage. You remember having

340 paid that yourself?

A. I have not paid it personally. I have no doubt it is paid and Naylor & Co. have receipts for the money.

175th Int. That is your recollection?

A. Yes.

176th Int. You have no personal knowledge of it?

A. No.

177th Int. Five per cent. commission and *del credere?*

A. That is a guarantee.

178th Int. That is an item of ten thousand eight hundred and ninety-eight dollars. To whom did that go?

A. It has no- gone to anybody, because it has not been paid.

179th Int. You have never paid it to any person—the firm of Naylor and Company, the plaintiffs in this case, never paid out ten thousand and eight hundred and ninety-eight dollars to any person?

A. Why on earth are they to pay anybody else for it?

180th Int. Now, won't you be kind enough to say that they never paid it? I want to get it into shape so a jury will understand it.

A. How can I pay to anybody else what I claim is due to me? I cannot pay to you what is due to me.

Mr. PUTNAM: That is not a charge for cash; it's a charge for brokerage.

181 Int. Did you ever pay for the use or on account of the Kansas City and Southern Construction Company ten thousand eight hundred and ninety-eight dollars as charged against them in the paper marked Exhibit D?

341 Objected to as assuming a cash charge, which is not made.

182d Int. Did you ever pay it?

A. I have never paid for any of my own services, but I have charged for them.

182d Int. read to witness by the stenographer.

A. The charge of ten thousand eight hundred and eighty-eight dollars is for my services. I have never yet paid anybody for my services, but I expect to be paid for them; hence I charged for them.

183 Int. That is not an answer. The stenographer will please read interrogato- number 182 again. I insist upon a definite answer to the question whether he ever paid that money to anybody. Then, as I understand you to say, the charge of ten thousand eight hundred and ninety-eight — stated in "Exhibit D" attached to this deposition is for a commission for yourself on the sale of part of the rolled iron ordered by the Kansas City and Southern Construction Company?

A. It is for a commission and guarantee and for my services in selling the rails for their account.

184th Int. You have received fifty thousand dollars in cash, and you charge in addition this ten thousand eight hundred and ninety-eight dollars, making in the aggregate sixty thousand eight hundred and ninety-eight dollars. Now, I will ask you to state if the construction company ever received from you one single, solitary pound of railroad iron for that charge.

A. The construction company never received any iron nor have I sold them any. I sold them steel. They had to deposit fifty thousand dollars as a margin for the faithful performance of their contract before I would entertain the contract. Rails, as is well known, fluctuate largely in value, and it is nothing unusual that without receiving any rails there might be a claim and this comes
342 of inability to carry out the contract. The claim we have was based on decline in market value. The fifty thousand dollars was only put up as a margin. Is that clear enough?

Mr. O'GRADY: No. I give you credit for talking all around it. What I want to know is did you ever deliver one pound, one single, solitary pound, of steel rails to the Kansas City and Southern Construction Company?

A. We have never delivered any rails to them.

185th Int. Now, you have got an item here of forty-one sixty for duty on seventeen tons of rails. When did you pay that?

A. Before we could get delivery of rails.

186th Int. When was that?

A. In the summer of 1880.

187th Int. Can you fix the time definitely?

A. Not more definitely than that.

188th Int. Did the Kansas Construction Company ever request you to pay that?

A. We never asked them for their request. I never had with them any conversation on the subject.

189th Int. You paid that voluntarily yourself.

A. No; I paid that compulsively, for I could not have had delivery of the rails which had arrived for them nor laid them down on their road without paying the duty which the United States Government claimed.

190th Int. Have you never had any conversation with any person connected with the Kansas City and Southern Construction Co. with reference to the payment of that sum of forty-one thousand one hundred and sixty dollars?

343 A. No conversation with them.

SEBASTIAN B. SCHLESINGER.

Subscribed and sworn to before me this 22nd day of April, 1885.

[SEAL.] HENRY P. BUTLER,

U. S. Commissioner for the Southern Dist. of N. Y.

344 EXHIBIT A. Henry P. Butler, U. S. Commissioner. Ap'l 20, 1885. H. P. B., Comm'r.

Contract.

Naylor & Co., of Boston, will please supply the Kansas City and Southern Construction Company with—

Quantity.—Five thousand (5,000) tons

Article.—English or German steel rails,

Inspection.—Sandberg's. It is requested that the maker of these rails shall as nearly as practicable observe the following formula:

Phosphorus, not above $\frac{10}{100}$ths of one per cent.

Silicon, not above $\frac{4}{100}$ths of one per cent.

Carbon, between $\frac{25}{100}$ and $\frac{40}{100}$ of one per cent., with an aim at $\frac{30}{100}$ of one per cent.

Manganese, between $\frac{30}{100}$ and $\frac{40}{100}$ of one per cent., with an aim at $\frac{35}{100}$ of one per cent.

Sulphur, copper, and other impurities not more than traces.

The year of manufacture, together with the maker's stamp, shall be marked in plain figures and letters on the sides of the web of each rail.

The manufacturer shall furnish test pieces to Mr. Sandberg as often as he may require them ready for testing; they shall have a tensile strength of above sixty thousand pounds per square inch,

with a percentage of elongation above twenty per cent. He shall keep such record of the chemical and physical tests applied to these specimens as may in his judgment seem to be necessary,
345 furnishing abstracts thereof to you for transmission to us.

Section.—As per your number eighty-four (84) Sandberg's 50 lbs. per yard.

Punching.—Left to Sandberg.

Notching.—None.

Lengths.—30 ft. with 10./. shorter down to 20 ft.

Shipment.—As nearly as may be, 1,250 tons monthly, beginning April, 1880.

Price.—Fifty-one — ($51) in bond, per ton of 2,240 lbs. delivered in New York.

Terms.—Ten to fifteen thousand dollars ($10 to $15,000) to be paid within twenty-four hours after purchase of rails, and within a week to ten days after the same time enough more to make up twenty-five thousand dollars ($25,000) as a margin, and ten per cent. (10%) margin to be kept good in case of a decline in the market price of steel rails. The balance of the purchase-money to be paid in cash on arrival.

You are to use your best endeavors to supply us with rails of good quality and finish, but beyond this you assume no responsibility.

You are not obliged to replace shipments lost at sea, nor to be responsible for occurrences beyond your control.

KANSAS CITY & SOUTHERN CONS. CO.,
By JAMES I. BROOKS, *Treas.*

Boston, 2d March, 1880.

346 EXHIBIT B. Henry P. Butler, U. S. Commissioner. Ap'l 20, 1885. H. P. B., Comm'r.

BOSTON, *May* 18, 1880.

Naylor & Co., Norway iron works, 6 Oliver street.

DEAR SIRS: Being unable to carry out our contract with you at the present time for rails, we authorize you to sell the rails for our account without in any way prejudicing your rights or claims for damages against us.

Yours truly,

JAMES I. BROOKS,
Pres't K. C. & S. C. Co.

Messrs. Naylor & Co.

347 EXHIBIT C. Henry P. Butler, U. S. Commissioner. Ap'l 20, 1885. H. P. B., Comm'r.

This memorandum of agreement made this 18th day of May, A. D. 1880, between Mess. Naylor & Co. of Boston and the Sonora Railway Co. Limited, witnesseth:

That the said Naylor & Co. hereby sells and the said railway

company hereby purchases three thousand five hundred and thirty (3,530) tons (of 2,240 lbs.) of Blaenavon steel rails.

Template.—Rails to be of 48-lb. section and of same pattern as those furnished under a contract between the same parties dated March 6th, 1880.

Punching and slotting to be the same as those furnished under the above-mentioned contract.

Quality.—To be of good merchantable Bessemer steel.

Inspection.—Rails are subject to inspection at the works, at the option of said railway Co. and at its expense.

Length.—Rails to be 30 feet long with not exceeding 10% shorter lengths in even feet, but none to be less than 20 feet.

Price.—The price to be £6.15/ per ton of 2,240 lbs. f. o. b. at Newport.

Delivery.—To be delivered f. o. b. at Newport one-half in
348 June (balance on this page obliterated)—same terms as said contract of March 6th, viz: To be available by said Naylor & Co. 60 days' drafts against bills of lading, or should no ship be provided by said railway Co. within four weeks after the arrival of the rails at New York, against storage receipts of the shipping agent of said Naylor & Co. or Naylor, Bengon & Co. at Newport, stating that they hold the goods for *for* account of and at the order of the banker issuing the credit.

In witness whereof the parties hereto have hereunto set their hands the day and year above mentioned.

Accepted.

NAYLOR & CO.
SONORA RAILWAY COMPANY, LIMITED,
By THOMAS NICKERSON, *Pres't.*

349 EXHIBIT D. Henry P. Butler, U. S. Commissioner. Ap'l 20, 1885. H. P. B., Comm'r.

(Copy.)

Approximate Statement, Not Including Interest.

You bought from us 5,000 tons steel rails at $51 in bond, say	255,000
Against which you paid us in cash	50,000
We have sold the 5,000 tons for your 2/c. as follows:	
3,530 tons @ £6.15/ f. o. b. Newport, Wales, 60 days from shipment, say	£23,827 10 0
On the portion shipped to New York we paid freight at 13/6 in full and insurance 9/16 %, it being fair to calculate that the same rates would have been paid if the rails had been shipped in fulfillment of the contract; we accordingly allow the same on these 3,530 tons, say freight, &c., 13/6	2,382 15 0
Insurance 9/16 % on same	140 12 6
	£26,350 17 6

@ 4.86¼			$128,131 12
300 tons sold @ 62½ N. Y.			18,750 00
950 " 60 "			57,000 00
220 " 64 "			14,080 00
5,000 tons			$217,961 12
Less 1 % brokerage on 950 tons @ $60 and 220 " 64	$711		
5 % commission & del credere	10,898		
$25 duty on 1,470 tons	41,160		
			52,769 00
	$665,192 12		$215,192
Amount due Naylor & Co.			$39,808

E. & O. E.
(S'g'd) NAYLOR & CO.

350 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Henry P. Butler, a commissioner of the circuit court of the United States for the southern district of New York, duly commissioned and sworn, qualified and acting as such under and by virtue of the several acts of Congress authorizing and regulating the taking of depositions *de bene esse* in civil causes depending in circuit and district courts of the United States, do hereby certify that the witness whose deposition is above set forth is material and necessary to the proper determination of the said cause in the caption set forth and described, and that the said witness is a resident of Beverly Farms, in the State of Massachusetts, the same being at a greater distance than one hundred miles from the city of Kansas City, Missouri.

I further certify that a notice of the time and place of the taking of said deposition and the name of the witness to be examined, signed by Gardiner Lathrop and Jefferson Brumback, att'ys for plaintiff, was served on the defendant, The Kansas City and Southern Construction Company, on the 17th day of April, 1885, and likewise served on the Kansas City and Southern Railway Company on the 8th day of April, 1885, as appearing by the acknowledgment of service, signed by Johnson & Lucas, attorneys for said interpleader, which said notice (in duplicate) and accompanying paper and certificates, &c., are returned herewith, marked Exhibits 1 and 2 respectively.

And I further certify that I was attended at said 99 John street, New York, at the office of Naylor & Co. aforesaid, by George Putnam, Esqr., attorney of said plaintiffs, and John O'Grady, Esq., and Sutherland Tenney, Esq., attorneys and of counsel for said Kansas City and Southern Railway Company, interpleader, and the
351 said witness, Sebastian Schleinger, who is of sound mind and lawful age, and by me sworn and examined, and his examination was thereupon taken down under my directions in steno-

graphic notes by a stenographer in the presence of the witness and from his statements; and the same having been afterwards reduced to writing by said stenographer and the deposition being read by said witness, he subscribed and swore to the same in my presence.

I do further certify that I am not of counsel nor attorney for either of the parties to the suit in controversy or in any way interested in the event of said suit.

In testimony whereof I have hereunto set my hand and affixed my official seal this 22nd day of April, A. D. 1885.

HENRY P. BUTLER,
[SEAL.] *U. S. Commissioner for the Southern Dist. of N. Y.*

352 *Notice to Take Depositions in U. S. Courts.*

UNITED STATES OF AMERICA, }
Western District of Missouri, } *ss:*

In the Circuit Court of the United States for the Western District of Missouri, Western Division, at Kansas City.

BERTHOLD SCHLESINGER *et al.*
against
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY, The Kansas City & Southern Construction Company, The Farmers' Loan & Trust Company, and James I. Brooks. } In Equity.

You, the above-named defendants, or your attorney of record, are hereby notified that on the 1st day of March, A. D. 1888, the above-named complainants will, in the above-entitled suit, at the law office of George Putnam, No. 50 State street, in the city of Boston, in the county of Suffolk, in the State of Massachusetts, take depositions of James I. Brooks to be used on the trial of said suit and on the hearing of each and every motion and application therein, and that the taking of said depositions will be commenced at ten o'clock a. m. of said day, and that the taking of the same will be adjourned and continued from day to day, Sundays excepted, at the same place, until the taking of the same is completed.

Dated this 23rd day of February, A. D. 1888.

J. BRUMBACK,
GEO. W. McCRARY,
Attorneys for Complainants.

Service of the above notice is hereby accepted, and issue of dedimus, filing of interrogatories, and all exceptions as to time are hereby waived, this 24th day of February, 1888.

JOHN O'GRADY,
Attorney of Record for the Kansas City &
353 *Southern Railway Company and the Kansas City & Southern Construction Company.*

UNITED STATES OF AMERICA, } ss:
District of Massachusetts, }

To James I. Brooks, of Boston, in said district of Massachusetts, Greeting:

Whereas the complainants have requested me to take your deposition to be used in an action now pending between Berthold Schlesinger *et al.*, plaintiffs, and The Kansas City and Southern Railway Company *et al.*, defendants, in the circuit court of the United States in and for the western district of Missouri, and the office of George Putnam, Esq., No. 50 State St., in Boston, in said district of Massachusetts, on the first day of March, 1888, at ten o'clock in the forenoon, are appointed the time and place for taking the said deposition, you are hereby required, in the name of the United States of America, then and there to appear to testify what you know relating to the said action. Hereof fail not.

Given under my hand and seal this 25th day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

FISHER AMES,
United States Commissioner.

[SEAL.]

UNITED STATES OF AMERICA, } ss:
Massachusetts District, }

BOSTON, *February 28th*, 1888.

Pursuant hereunto, I have summoned James I. Brooks to appear at time and place within named by giving him in hand a duly attested copy of this summons and paid him two dollars for his attendance and travel as within directed.

W. M. H. COPELAND,
Deputy U. S. Marshal.

Fees.

Service & copy	1 00
Travel	12
Paid witness	2 00
	3 12

354 In the Circuit Court of the United States for the Western District of Missouri, Western Division. In Equity.

BARTHOLD SCHLESINGER *et al.*
vs.
KANSAS CITY AND SOUTHERN RAILWAY COMPANY and KANSAS CITY AND SOUTHERN CONSTRUCTION COMPANY.

MARCH 1ST, 1888.

Deposition of James I. Brooks, taken before Fisher Ames, U. S. commissioner, at the office of George Putnam, 50 State St., Boston, Mass., pursuant to a notice and summons hereto affixed.

Mr. George Putnam, counsel for complainant-; Mr. John O'Grady, counsel for respondents.

It is agreed by counsel that the testimony be taken in short-hand and the signature of the witness waived.

Mr. JAMES I. BROOKS, having been duly sworn, testified as follows:

Direct examination by Mr. PUTNAM:

Q. 1. What is your name, age, residence, and occupation?

A. James I. Brooks; 38; Boston; banker and broker.

Q. 2. Were you ever connected with the Kansas City and Southern Construction Company; and, if so, in what capacity?

A. I have been connected with it, and was one of the directors; at one time treasurer and afterwards president, and still hold those offices.

Q. 3. Were you ever the owner of the Kansas City, Memphis and Mobile R. R.?

A. I was.

Q. 4 And its franchises and property?

A. I was.

355 Q. 5. Was that property transferred to the construction company?

(Objected to by Mr O'Grady as incompetent, irrelevant, and immaterial, because if so transferred the written evidence is the best.)

A. It was.

Q. 6. What was the Kansas City, Memphis and Mobile R. R. property at the time it was transferred to the construction company?

A. The property consisted of the road-bed, franchises, rights of way, and was in a generally bad condition, having lain for some eight or ten years. The bridges which had been built had rotted away, but the abutments were still in good condition. The road-bed from Kansas City was not in as good condition as the Osceola end. There was a tunnel—it was not quite completed—and the embankments were in good condition generally. Down at the lower end of the section running from Clinton, the division running from Clinton toward Osceola, was in better condition, as I have stated,

and the stone-work was in exceptionally good condition—practicalle as good as when put in.

Q. 7. What did the property consist of?

A. It consisted of rights of way, real estate that in some instances had been paid for in fee, and in some cases rights of way given by gift. It consisted in rights in depot grounds in Kansas City and the embankments and abutments for bridges. There were a good many old ties ly- there all around, practically good for nothing, the rails having been taken up and the ties thrown aside. I believe the old company sold the rails.

Q. 8. How many miles of road-bed?

A. About forty in the upper section and thirty in the lower.

Q. 9. Was there an approach to Kansas City?

A. There was.

356 Q. 10. A right of way into the city?

A. Yes; it is owned in fee; I have the deeds.

Q. 11. When was that property conveyed to the construction company?

A. I have forgotten the exact date. I think some time in 1880. I am not certain.

Q. 12. Did the construction company expend any money on this property?

A. Yes, sir.

Q. 13. About how much?

A. They expended $20,000 or $30,000 out there.

Q. 14. Had the construction company any other property?

A. No, sir; this is the only property they had.

Q. 15. Has the construction company now any other property?

A. No, sir.

Q. 16. Do you know who now has possession of that property?

A. I presume that the construction company—no; the property was assigned by the construction company.

(Objected to by Mr. O'Grady, the answer not being responsive.)

Q. 17. To whom was it assigned by the construction company?

(Objected to for incompetency and irrelevancy, because if such transfer was made the evidence of the transfer is in writing, and because the answer of the witness seeks to prove the contents of a written instrument.)

A. To myself, as trustee.

Q. 18. Is the property now in the possession of the construction company?

(Objection to question as incompetent and irrelevant, because it seeks a conclusion of the witness as a material fact in this case.)

357 A. So far as I know, the property is lying in the same condition in which it was left by me, and I presume it is subject to the control of whoever has the legal title to it.

Q. 19. So far as you know, did the construction company ever

acquire any other property than that which it acquired by the purchase of the Memphis & Mobile R. R.?

A. It was the only property the company ever acquired, and the entire object of the formation of the construction company was to acquire this property and the completing and putting it into condition for a railroad.

Cross-examination by Mr. O'GRADY:

X Q. 1. Now, don't you know that your last answer is untrue?

A. No, sir.

X Q. 2. You say you have been president of the Kansas City and Southern Construction Company?

A. President.

X Q. 3. You have been president?

A. I have.

X Q. 4. Do you mean to tell me there is anything in the charter of that company with reference to the acquirement of the old line of the Kansas City, Memphis & Mobile R. R.?

A. By the charter of that corporation they can borrow money, buy railroads——

X Q. 5. Is there anything in the charter about the Kansas City, Memphis & Mobile R. R.?

A. Of course not.

X Q. 6. In the by-laws is there any reference to the Kansas City, Memphis & Mobile R. R.?

A. Of course not. You ought to know that what is stated in a charter of a corporation and what is done are two different things; that there is always a definite object for the formation of
358 a corporation, and in making the charter they have to comply with certain legal technicalities and forms. There always has to be a definite object for the formation of a corporation. This may have been organized for the purchase of property, but the charter of the construction company was created and obtained in order to develop this property.

X Q. 7. You say you were president?

A. Yes, sir.

X Q. 8. Are you now?

A. Yes, sir.

X Q. 9. How long have you been?

A. Since 1880.

X Q. 10. Continuously ever since?

A. Yes, sir.

X Q. 11. Are you as well satisfied about that as any other fact you have testified to?

A. I am satisfied that other parties by fraud have pretended to obtain the possession of this corporation, but when a man goes to work and irregularly elects directors and then undertakes to assign property or do anything by the directors elected by fraud it is a very serious question whether they have the right to do it in any way, shape, or manner.

X Q. 12. You are James I. Brooks, and stand alone in this corporation? You are the only party who represents it?

A. No; there are other stockholders.

X Q. 13. You say that you have been president of this corporation up to the present time from its organization?

A. Yes, sir.

— Q. —. You now are president?

A. Yes, sir.

359 X Q. 15. There is no mistake about it?

A. No mistake.

X Q. 16. You are as well satisfied of that as of any other fact in the case that you have testified to?

A. I said these people had by a fraudulent process gone to work to get control of the corporation.

X Q. 17. Have you the records?

A. Certainly.

X Q. 18. You have got the records of the construction company now?

A. Yes, sir.

X Q. 19. What records?

A. Of subsequent meetings that have been held.

X Q. 20. Subsequent meetings to what time?

A. To the meeting of the old corporation. A demand was made on the old secretary, who went out of office, for the records, and he declined to give them up.

X Q. 21. Who are the officers of the construction company now? Who are the directors?

A. Mr. Ripley, Mr. Tenney, myself, Mr. Cramm, Mr. Jernegan.

X Q. 22. Where does Mr. Cramm live?

A. Cambridge.

X Q. 23. And the other gentleman?

A. In Boston.

X Q. 24. What is his first name?

A. I have forgotten now.

X Q. 25. What place does he live—what street and number?

A. I can't remember; at the South end.

X Q. 26. What business is he engaged in?

A. He is a doctor.

X Q. 27. Now, when was it they deposed you as president—in other words, ousted you?

360 A. We had a meeting at the time, at which we voted a majority of the stock.

X Q. 28. When was that held?

A. At that meeting I was appointed president for the ensuing year. They pretended to have gone out and held a subsequent meeting and undertook to maintain that they had appointed a new president.

X Q. 29. I ask when that meeting was held.

A. I can't remember the date.

X Q. 30. What year?

A. I cannot tell you.

X Q. 31. You can't remember the date or the year?

A. I think it was the annual meeting?

X Q. 32. 1884, '83, '82—which?

A. Well, I don't remember which year it was. It was along there somewhere—early in the eighties.

X Q. 33. You understood, then, that you were deposed as president?

A. No, sir.

X Q. 34. Did you ever receive any notice that you were ousted?

A. No, sir. They had no authority to oust me. It was simply an annual meeting, and of course new officers were appointed at that meeting.

X Q. 35. Have you ever attended a meeting of the board of directors of that company since?

A. Certainly; a good many.

X Q. 36. Where?

A. Here in Boston.

X Q. 37. Did they have the old records?

A. No; because they went to New York and demanded the records and they refused to give them up.

361 X Q. 38. Have you ever sat in any meeting with the Mr. Tenney you have mentioned?

A. No.

X Q. 39. With Mr. Ripley?

A. No.

X Q. 40. Have any of the other officers attended any other meetings with you since?

A. Yes; a majority of the board of directors.

X Q. 41. A majority of the board of directors as elected then?

A. Yes; that was a meeting for the election of officers.

X Q. 42. Was Mr. Jernegan at that meeting?

A. Yes, sir.

X Q. 43. Who else?

A. Mr. Cramm, Mr. Ripley, Mr. Tenney, and myself, and Mr. Wheeler, I think, was present. They undertook to hold two meetings in one.

X Q. 44. You had a quarrel at the regular meeting?

A. No; they admitted that I was t-e presiding officer, the president; they didn't dispute it at all.

X Q. 45. Prior to that time were you deposed by resolution of the board?

A. There had been no regular meeting of the board. There had been action by Mr. Ripley and Mr. Tenney to undertake to foist two fraudulent directors and create a board, but the action was fraudulent, and I don't care what they did, the whole thing was a fraud from the beginning.

X Q. 46. You have got some deeds of the Kansas City and Southern Railroad Company?

A. I have.

362 X Q. 47. How many?

A. 30 or 40.

X Q. 48. Can you give the names of the parties who made the deeds?

A. Certainly not.

X Q. 49. Will you produce those deeds here?

A. No, sir; I said I had the deeds; I have not; they are in the possession of the construction company.

X Q. 50. Do you mean that you have no deeds except those that are on record?

A. Certainly not.

X Q. —. You mean to say that they are all recorded?

A. All recorded.

X Q. 52. 30 or 40 deeds in your possession placed on record by the Kansas City and Southern Construction Company, of which you are the custodian?

A. I am not.

X Q. 53. Who is?

A. I presume whoever the officer is provided by the by-laws as the proper custodian.

X Q. 54. Do you know who is the custodian?

A. No, sir.

X Q. 55. You are the president of the company?

A. Yes, sir.

X Q. 56. When did you see those papers last?

A. I have not seen them for a good many years.

X Q. 57. Why did you say that you had possession of them if such was not the fact?

A. I mean that the construction company had them.

363 X Q. 58. Did you mean that you were the construction company?

A. No, sir.

X Q. 59. Are those papers in Boston?

A. I presume they are.

X Q. 60. Do you know where those papers are now?

A. I could not tell just where they are at present.

X Q. 61. Haven't you any idea?

A. I have an idea, but I am not certain if they are there.

X Q. 62. Do you know in whose possession they are?

A. I think they are filed away with some other papers; I can't tell just where they are.

X Q. 63. Who is the secretary of this organization you spoke of?

A. Mr. Cramm, I think.

X Q. 64. Is he the custodian of the books and papers of the construction company as it stands to-day?

A. I don't know whether he is the official custodian or not; I should have to look at the records.

X Q. 65. You don't know who is the custodian of them?

A. No, sir.

X Q. 66. Those 30 or 40 deeds are all recorded?

A. All recorded and everything I had. I speak as the construction company. I think I paid for the recording of them; also for the company.

X Q. 67. Did you not get those deeds from Mr. Briggs?

A. Briggs?

X Q. 68. The old engineer of the Kansas City and Southern.

A. I don't think I ever saw Mr. Briggs.

X Q. 69. Did the construction company ever get any deeds from Mr. Briggs?

A. I don't think they did.

364 X Q. 70. Where is this property located?

A. What property?

X Q. 71. That you say you have 30 or 40 deeds of.

A. It is rights of way of the Kansas City, Memphis & Mobile railroad.

X Q. 72. Through the county of Jackson?

A. All over the line—what property was turned over to me when I bought the road.

X Q. 73. And all recorded?

A. All recorded.

X Q. 74. No deed in your possession except what is recorded?

A. That is all.

365 UNITED STATES OF AMERICA, }
District of Massachusetts. }

I, Fisher Ames, a commissioner in and for the district of Massachusetts, appointed by the circuit court of the United States for the first circuit under the act of Congress authorizing the appointment of commissioners "for the more convenient taking of affidavits and bail to be used in civil causes depending in the courts of the United States" and acts additional thereto, do hereby certify that James I. Brooks, the above-named deponent, appeared before me on the first day of March, A. D. 1888, at the office of George Putnam, Esqr., No. 50 State street, Boston, in said district of Massachusetts, and he, said deponent, having been by me first duly sworn, gave the foregoing deposition; that, by agreement of counsel, said deposition was taken in short-hand by a disinterested person appointed by me for that purpose, and the signature of the witness waived; that said deposition was taken at the request of the plaintiffs in the cause aforesaid and upon the notice and summons hereto prefixed.

I further certify that I am not of counsel nor of attorney to either of the parties in the cause for which said deposition was taken nor in any way interested in the event of said cause.

In testimony whereof I have hereunto set my hand seal this first day of March, in the — eighteen hundred and eighty-eight.

[SEAL.] FISHER AMES,
U. S. Commissioner.

366 *Notice to Take Depositions.*

In the United States Circuit Court, Western Division, Western District of Missouri.

THE COUNTY OF JACKSON, }
State of Missouri. }

BERTHOLD SCHLESINGER and Others, Complainants,
against
THE KANSAS CITY AND SOUTHERN RAILWAY and THE KANSAS City & Southern Construction Company and Others, Respondents.

To the above-named defendants:

You are hereby notified that depositions of witnesses to be read in evidence in the above-entitled cause on the part of the plaintiffs will be taken at the law office of Gannt & Casey, in the city of Clinton, in the county of Henry and State of Missouri, on the 9th day of March, A. D. 1888, between the hours of nine o'clock in the forenoon and six o'clock in the afternoon of that day, and that the taking of said depositions, if not completed on that day, will be continued from day to day at the same place and between the same hours till completed.

PRATT, McCRARY, FERRY & HAGERMAN,
Solicitors and Attorneys for Pl'ffs.

Service of the above notice is hereby acknowledged and issue of dedimus and all exceptions as to time waived; also the suing out of authority to examine.

March 8th, 1888.

JOHN O'GRADY, Esq.,
Sol. for Def'ts.

367 *Deposition.*

In the United States Circuit Court for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER and Others, Plaintiffs,
against
THE KANSAS CITY AND SOUTHERN RAILWAY and THE KANSAS City and Southern Construction Company and Other-, Defendants.

Depositions of witnesses produced, sworn, and examined on the 9th day of March, 1888, between the hours of nine o'clo-k in the forenoon and six o'clock in the afternoon of that day, at the law office of Gannt & Casey, in the city of Clinton, in the county of Henry and State of Missouri, before me, Walter E. Owen, a notary public within and for said county and State, in a certain cause now pending in the United States circuit court for the western division of the western district of Missouri under and in pursuance of stipulations therefor, in the cause wherein Berthold Schlesinger and others are plaintiffs and The Kansas City and Southern Railway and The Kansas City and Southern Construction Company and others are defendants.

WILLIAM C. BURKE, of lawful age, being produced, sworn, and examined on the part of plaintiffs, deposeth and says:

My name is William C. Burke; age, 31 years; my residence is Clinton, Henry county, Missouri; am civil engineer by occupation; I have been a civil engineer ten years. It is part of my duties as an engineer to estimate the measurement of stone-work, excavations, and embankments of railroads.

Q. Are you acquainted with the road-bed, bridges, culverts, trestle-work, grades, and fills and cuts on a railroad from Clinton, Henry county, Missouri, to Osceola, in St. Clair county, Missouri, generally known as the Kansas City and Southern at present and formerly known as the Kansas City, Mobile and Memphis railroad?

368

Ans. I know there is such a road; have known it for three years.

Q. Have you recently made measurements of the stone-work in the bridges and culverts and the timber in trestles, cattle-guards on said railroad from Clinton to Osceola; and, if so, when and what was the extent of your measurement?

Ans. I measured all the stone-work and timber in the trestle-work and cattle-guards between Clinton and Osceola on said railroad, commencing on the 21st day of February and ending on the 25th day of the same month, A. D. 1888, and from that measurement I have ascertained that there is twenty-five hundred and four-tenths yards, approximately, of bridge masonry, worth ten & $\frac{50}{100}$ dollars per cubic yard, and 2,563.7 cubic yards of culvert ma-

sonry, worth, approximately, five & $\frac{50}{100}$ dollars per cubic yard, and then 76,822 feet, board measure, timber in trestles and cattle-guards, worth, approximately, thirty-five dollars per one thousand feet; a total value, according to the above estimate, is forty-three thousand eight hundred and nine $\frac{82}{100}$ dollars.

Q. State if you as an engineer could state from an examination of the stone-work in the bridges and culverts whether it had been built in the last three years or at a much earlier period.

Ans. I should say that the piers and culverts showed they were built more than five years ago, and some look as though they had been built twenty-five years ago. All the box culverts were built before the embankment was thrown in around them.

Cross-examined by JOHN O'GRADY, att'y for defendants:

Q. State if you know when the bridges and cattle-guards and trestle-work on the Kansas City and Southern railroad be-
369 tween Clinton and Osceola were built and constructed.

Ans. I don't know; from appearances the Grand River bridge is comparatively new, not more than three or four years old, but the trestles and cattle-guards look as though they might have been built for the last eight or ten years.

Q. When did you first go over the line of the K. C. & S. R. R. *from* Clinton and Osceola?

Ans. In the fore part of 1885.

Q. You never saw it until then?

Ans. No, sir.

Q. Who employed you to make the measurements to which you have just testified?

Ans. Judge Gannt, on behalf of the plaintiffs in this suit.

Q. Do you know what improvements were on the line of the K. C. & S. R. R. at the time the Kansas City and Southern Railway Company took possession?

Ans. No, sir.

Redirect by Judge GANNT:

When I spoke of the Grand River bridge being comparatively new, I referred to the superstructure and not to the piers. The piers seem to have been built some years.

W. C. BURKE.

Subscribed and sworn to at the place, within the hours, and on the day first aforesaid.

WALTER E. OWEN,
Notary Public.

370 FRANK S. WARE, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposes and says:

My name is Frank S. Ware; am 44 years old, and a resident of Clinton, Henry county, Missouri. I am collector of revenue of Henry county, Mo.

Q. State if you know when the railroad from Clinton, in Henry county, Missouri, to Osceola, in St. Clair county, Missouri, and at present known as the Kansas City and Southern railroad was first constructed.

Ans. I think it was finished in October, 1871.

Q. State fully how much of said railroad was built at that time.

Ans. All the mason-work between Clinton and Osceola was built at that time.

Q. Who had the contract to do the stone-work between Clinton and Osceola?

Ans. Frank McCabe had the contract and did the work. Frank McCabe lived at Sedalia at that time. I was book-keeper and pay-master for him.

Q. Who had the contract for doing the grading?

Ans. J. B. Colt, of Clinton, Mo.

Q. When you speak of all the masonry being completed between Clinton and Osceola, you include the piers of Grand River bridge?

Ans. Yes, sir; I think Mr. Colt completed the grading of said railroad about the same time the bridge masonry & culvert-work was completed. I have resided most of the time since 1871 in Clinton, Henry county, Mo., and am familiar with said railroad.

Q. I ask you if, to your knowledge, all or at least a large part of this stone-work built as you have stated in 1871 and all
371 this grading was not on this railroad at the time the Kansas City and Southern railway took charge of it, about three years ago.

Ans. All the second-class masonry was there except one pier at Gallinepper. You know much of the dirt-work would wash away.

F. S. WARE.

Subscribed and sworn to at the place, within the hours, and on the day first aforesaid.

WALTER E. OWEN,
Notary Public.

STATE OF MISSOURI, }
County of Henry, } *ss:*

I, Walter E. Owen, a notary public within and for Henry county, Missouri, do certify that in pursuance of the annexed notice came before me at the law office of Gannt and Casey, in the city of Clinton, in the county of Henry and State of Missouri, William Burke and Frank S. Ware, who were by me duly sworn to testify the whole truth of their knowledge touching the matter in controversy aforesaid; that said witnesses were examined and their examination reduced to writing and subscribed by them in my presence on the day, between the hours, and at the place in that behalf first aforesaid, and said depositions are now herewith returned.

Given at the city of Clinton, in the county of Henry and State of Missouri, this 9th day of March, 1888.

My com. expires Feb'y 26th, 1891.

[SEAL.] WALTER E. OWEN,
Notary Public for Henry County, Missouri.

372 *Notice to Take Depositions in U. S. Courts.*

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

BERTHOLD SCHLESINGER and SEBASTIAN SCHLESINGER, Partners as Naylor & Co.,
against
THE KANSAS CITY & SOUTHERN RAILROAD CO., The Kansas City and Southern Construction Co., The Farmers' Loan & Trust Co., & James I. Brooks. } In Chancery.

You, the above-named defendants, or your attorneys of record are hereby notified that on Wednesday, the 1st day of February, A. D. 1888, the above-named complainants will in the above-entitled suit, at the law office of Pratt, McCrary, Ferry & Hagerman, room 18 Thayer building, Kansas City, in the county of Jackson, in the State of Missouri, take depositions of William Miller, to be used as evidence on the trial of said suit and on the hearing of each and every motion and application therein.

And that the taking of said depositions will be commenced at nine o'clock a. m. of said day, and that the taking of the same will be adjourned and continued from day to day, Sundays excepted, at the same place until the taking of the same is completed.

Dated this tenth day of January, A. D. 1888.

J. BRUMBACK,
GEO. W. McCRARY,
Attorneys for Complainants.

373 Service of the above notice is hereby accepted and issue of dedimus, filing of interrogatories, and all exceptions as to time are hereby waived this 16th day of January, 1888.

JOHN O'GRADY,
Attorney of Record for the Kansas City & Southern Railway Company & the Kansas City and Southern Construction Co.

374 In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

BERTHOLD SCHLESINGER & SEBASTIAN SCHLESINGER, Partners as Naylor & Co., Plaintiffs,
v.
KANSAS CITY & SOUTHERN RAILWAY COMPANY, Kansas City & Southern Construction Company, The Farmers' Loan & Trust Company, and James I. Brooks, Defendants. } In Chancery.

Deposition of witness produced, sworn, and examined on the 1st day of February, in the year of our Lord 1888, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the law office of Pratt, McCrary, Ferry & Hagerman, room- 18 & 19 Thayer building, Kansas City, in the county of Jackson and State of Missouri, before me, Fred. P. Barnett, a notary public within and for said county and State, in a certain cause now depending in the circuit court of the United States within and for the western division of the western district of Missouri, between Barthold Schlesinger *et al.*, plaintiffs, and The Kansas City & Southern Railway Company *et al.*, defendants, on the part of plaintiffs.

375 WILLIAM MILLER, being produced, sworn, and examined on the part of the plaintiffs, deposeth and saith:

Direct examination by Mr. MCCRARY:

1. Please state your name, residence, and occupation.

(By Mr. O'GRADY:) The respondent The Kansas City & Southern Railway Company objects to the taking of any testimony under the issues in this case.

A. My name is William Miller; residence, Kansas City, Missouri; am a civil engineer by occupation.

2. How long have you been engaged in the business of civil engineering?

A. All my life—some forty-odd years, I believe.

3. Were you ever in the employ of a corporation known as the Kansas City, Memphis & Mobile Railroad Company? If so, when and how long?

A. I was employed in 1871 by that company for probably a year.

4. In what kind of employment?

A. As civil engineer in revising a location; in making a part of a location and revising the balance from here to Clinton, in Henry county.

5. Over what route, speaking generally, did that company commence the construction of a railroad?

A. From Kansas City through Westport, west of Hickman's mills, and by Belton, following a graded road for three or four miles eastward, then to Harrisonville, passing west of Peculiar, passing half

or three-quarters of a mile west of a post office called Peculiar, to Harrisonville.

376 6. To what point? What was the further point or terminus?

A. To Clinton, sir. There was several small towns that we passed on the way there.

7. What did you have to do, if anything, with the grading of the roadway of that company over the route you have referred to?

A. I didn't have any charge of the grading, sir. After completing the location I was employed in the office in fixing up drawings and papers of one kind or another connected with the road and the right of way, etc.

8. What knowledge have you of the nature and extent of the work done by that company in the way of grading and preparing the road-bed?

A. I knew of the work while it was in progress from being connected with the company for several months and from being a citizen here, and since then, by request of this firm of Pratt, McCrary & Ferry, I have gone over the ground and made a rough estimate of the quantities.

9. You may state now, approximately, the present condition and give a rough estimate of the present value of that old grade of the Kansas City, Memphis and Mobile railroad from Kansas City southward to Osceola. If you have any memoranda you may refresh your memory from them.

A. Yes; sir; I have estimates and details taken roughly——

(By Mr. O'GRADY:) I object to his refreshing his memory from any papers in this matter.

10. You can state that you refresh your memory by reference to memoranda which you have taken.

A. Oh, yes; by my memoranda. I have my memoranda in detail in a small book here, in which I took notes while I was

377 engaged on this work, and the notes are very full. The book is entirely filled with them, sir.

11. Well, I don't ask for details, but I want a general estimate.

A. The substance of that is contained in the papers which I have in my hand and which I have been referring to.

12. What papers are they?

A. They are a report. I will read the first part of it to show the object of the——

Objected to.

13. I don't care about your doing that myself, Mr. Miller. You can state what papers you refer to for the purpose of refreshing your memory and then answer my question.

A. The first paper here is a memorandum of instructions or memoranda; they are several of them; and then follows a letters and after that comes a report containing the consolidation of these estimates or a condensed statement of these estimates.

14. Now, having referred to that paper which you have in your

hand for the purpose of refreshing your memory, please answer my question as I first put it, which is as follows: State approximately the present condition and give a rough estimate of the present value of that old grade of the Kansas City, Memphis & Mobile Railroad Co. from Kansas City southward to Osceola.

A. I have stated here that the work was done fifteen years ago. The estimate includes $20,000 for right of way through Jackson county and $123,880 was estimated as being the present value of the work in its present condition as it now stands or as it stood
378 before any further improvements were made upon it recently.

15. That is in Jackson county alone?

A. That is in Jackson county alone; and then $55,820 in Cass county at the time it was taken possession of by the Kansas City——

16. I want to come to that a little later, Mr. Miller.

A. And then $125,000 and $15,000 for right of way.

17. In what county?

A. That would be in Henry and St. Clair counties.

By Mr. O'GRADY:

18. How much, you say?

A. $140,000 would be the aggregate of the road-bed.

19. $140,000 where?

A. That would be the value of the road-bed at the time it was—well, its present value, of course, would be very much more because a great many——

By Mr. MCCRARY:

20. I am asking about the old grade.

A. Well, the value of the old grade would be about $140,000.

By Mr. O'GRADY:

21. Where?

A. Through Henry and St. Clair counties.

22. You mean through Henry and St. Clair counties?

A. Yes, sir; that portion of it.

By Mr. MCCRARY:

23. What is the total value, as you estimate it, of that old road-bed, including the masonry and work done over the whole line from Kansas City to Osceola?

A. $319,700.

379 25. In making up your estimate did you go into an investigation as to the amount of grading, quantity of masonry, and other work on that old grade, and how carefully did you make your calculations?

A. I passed over the line. A large portion of the way there were center stakes set, and the stakes were numbered and I looked at them, and they would, for instance, commence at nothing here and there would be ten feet of a cut in the center, and probably at the other end it shelved off in the same way to nothing; and I roughly

estimated the average depth of the cut and the average width as near as I could get to it, taking the bottom width, and in some cases a slope of 1 to 1 and some places a slope of 1½ to 1, making a liberal allowance for wash and deterioration.

26. What did you see in the way of masonry that was a part of the old grade?

A. The masonry was badly damaged in some places; the part in Jackson county was in better preservation; more especially at this end of the road it was in better preservation than it was at the further end. In Cass county the condition in places was very bad indeed. The foundations had been defective and the storms had damaged it and washed it out; washed under the masonry in a number of places; even the stones were washed out.

27. State whether the defendant The Kansas City and Southern Railway Company is now in possession of that old grade; and, if so, what portion and when did it take possession?

A. They are in possession of that portion of the road from Clinton to Osceola.

28. How great is the distance between the two places?

A. It is about 26 miles.

29. How long has the Kansas City and Southern Railway
380 Co. been in possession of that part of the old grade?

A. It seemed to have been about December 14, 1882, that work was commenced at Clinton, and eight miles of the road were in operation on June 11, 1883.

30. What has been added to that old grade in the way of improvements by the defendant The Kansas City and Southern Railway Company; about what?

A. I have no means of knowing how much the work cost, and took no estimate of it. The road is completed and in full operation, with station buildings and passing tracks and some buildings for repair shops at each end, and it is in running order and daily trains passing over it.

31. What was the condition and about what was the value of the old grade between Clinton and Osceola at the time it was taken possession of by the defendant The Kansas City & Southern Railway Co. at the time you have named?

A. Oh, I judge it was in good condition. As to the work at this end of the road through Jackson and Cass counties, there had been more care taken in finishing up the work, and I should judge it was in a very good condition. There would be some clearing to do by timber having grown over it, and so on; but the work was in very good condition. The masonry especially was very well done, I think.

32. About what was the value of the old grade?

A. Of course I have no means of knowing just the condition it was in at the time it was taken possession of by passing over the old road, but, judging from present appearances, I judge that to be the case.

33. About what was the value of that twenty-six miles of grade, including the masonry, at the time it was taken possession of by

the defendant company? I mean between Clinton and Osceola?

381 A. Oh, I suppose about $140,000 or $150,000. $140,000 I have estimated it as being worth.

34. When was that grading done between Clinton and Osceola by the Memphis & Mobile Railroad Co.?

A. I find here I call this distance twenty-four miles from Clinton to Osceola and not twenty-six. It was during the years 1871 and 1872 that that work was done.

Cross-examination.

By Mr. O'GRADY:

35. Captain, you state that the work done on the old Kansas City, Memphis & Mobile between Clinton and Osceola was worth $140,000.

A. About; yes, sir.

36. Does that include the right of way; that estimate?

A. It includes $15,000 for right of way.

37. Do you know whether that right of way has ever been paid for?

A. Only by conversation and by——

38. Do you know of your own knowledge?

A. Well, only by hearsay, sir.

39. Then you don't know?

A. Not of my own knowledge.

40. Now, you say $15,000 for right of way. Do you mean $15,000 between Clinton and Osceola?

A. Yes, sir.

41. For right of way?

A. Yes, sir.

42. Twenty-six miles?

A. That is, the part that was paid for. I am not aware whether the whole was paid for or not.

382 43. Now, do you know whether $15,000 is sufficient to procure the right of way for 26 miles through that country?

A. It could not be done now.

44. It could not be done now?

A. No, sir; not for that price.

45. Did you assist in procuring any of the right of way for this road during the year 1872 yourself?

A. No, sir.

46. Then you had no personal knowledge of the value of right of way at that period in that country?

A. Not other than a general knowledge of the value of land and the great desire there was amongst the citizens to have the road built.

47. Now, what is your basis for calculating that there was $140,000 spent on that road in 1872? Did you go over it personally yourself during that time after the——

A. No.

48. You did not?

A. No.

49. You never were over it?

A. I never was over the work while it was in progress.

50. When did you go over the work?

A. I went over the work between September 15th of last year and the end of the month—between the 15th and 30th of September.

51. Of what year?

A. 1887.

52. Then that was the first time you ever went over the
383 work between Clinton and Osceola?

A. Yes, sir.

53. Then, as a matter of fact, you have no personal knowledge of the quantity of work that was done there by the Kansas City, Memphis and Mobile, have you?

A. Not other than from such documents as were placed in my hands by parties at Osceola, and from conversation with some parties who were connected with the company at the time work was in progress at Clinton.

54. Then your entire testimony as to the quantity of work done on that line between Clinton and Osceola is founded upon hearsay evidence, and you have no personal knowledge whatever yourself of the matters to which you have testified? Isn't that a fact?

A. Yes—that is, measurably so. I assume that the documents I saw in manuscript and printed matter, statements made not officially, however, but published as being statements from the company—that they were correct.

55. Now, what documents do you refer to in your last answer?

A. A history of St. Clair county, published a few years ago.

56. Published how?

A. By parties who took subscriptions.

57. Published in a book?

A. Published in a book; yes, sir.

58. A printed volume?

A. Yes, sir; and I also saw copies of certified estimates from Mr. Greenwood, who was chief engineer of the road during its construction, and which copies are at present in the hands of Mr. Meade at Osceola.

59. Who is Mr. Meade?

384 A. He was a director of the Kansas City, Memphis & Mobile Railroad Company during its construction.

60. Then, as I understand you, you say your testimony as to the value of the work done by the Kansas City, Memphis & Mobile Railroad Company between Clinton and Osceola is predicated entirely on matter in a printed volume said to contain the history of St. Clair county, and from copies of certain certified estimates that were said to be made out by the chief engineer of that company. Is that correct?

A. And I will state further—I didn't think of it when the question was first put——

61. You don't answer my question first, Captain.

A. I will give you the answer, sir. I desire to state further that I have examined reports made by a committee of citizens to a public meeting held in Jackson county as to the moneys that had been expended belonging to the county in the construction of the Kansas City, Memphis and Mobile road. Their report is said to be on file with the county court.

62. That refers to Jackson county?

A. It refers to the entire road.

63. Then your testimony as to the value of the work done by the Kansas City, Memphis & Mobile Railway Company between Clinton and Osceola is predicated upon the contents of a printed volume said to be the history of St. Clair county, and upon copies of certified estimates by the chief engineer of the company for the construction of that part of the road, and from the proceedings of a public meeting held in Jackson county. Isn't that correct?

A. That is correct from the report, yes; a report to a public meeting held in Jackson county, yes.

385 64. Now, don't you know as a matter of fact that there was a vast amount of money stolen and illegally appropriated by the projectors of that road about the time it was built? Didn't you also find that in the printed volume of St. Clair county to which you referred in a former part of your examination?

A. Yes; I found statements of that kind.

65. Didn't this man Meade, whom you stated showed you copies of estimates made by the chief engineer, figure in that history of St. Clair county as one of the biggest thieves in the whole transaction right in that very volume?

A. A committee of the citizens of St. Clair county exonerated Mr. Meade and one other gentleman, whose name I have forgotten, as not being implicated in those frauds.

66. Didn't that history of St. Clair county show that he received a large sum of money for which he had no vouchers to show how it was expended?

A. I am not aware that it does.

67. You are not aware of that fact?

A. No, sir.

68. Now, Captain, you stated that the Kansas City & Southern Railway Company went into possession of the road between Osceola and Clinton in December, 1882. Do you know that of your own knowledge?

A. No.

69. From whom did you receive that information?

A. From Robert C. McBeth, who claimed to have made a contract with Mr. Bailey or parties whom Mr. Bailey represented, that a certain length of the road should be finished within a given time.

70. Where did you see Mr. McBeth?

386 A. In Clinton.

71. What did Mr. McBeth say to you, if you remember, in reference to that road?

A. I can only answer that question by the notes I have taken here. He gave me those dates. I think there was no conversation

other, sir, than that in connection with the commencement of the work and matters of that nature that I desired to learn from him.

72. Mr. McBeth furnished you all the information that you wanted, did he, that was within his knowledge?

A. The information that was within his knowledge; yes, sir; he referred to some papers that he had in connection with it.

73. Did Mr. McBeth know what you were seeking the information for?

A. I don't suppose he did, sir. I had known Mr. McBeth a number of years ago. I stated to him that I was employed by the Nettleton party; but we had quite a pleasant chat in regard to the old matters and——

74. Mr. McBeth is also one of the gentlemen who is put down as having received a large slice of that fund that he has never accounted for in that celebrated history to which you refer, and Mr. McBeth wasn't whitewashed at any meeting of citizens either, was he?

A. I don't know, sir.

75. You don't?

A. Not of my own knowledge.

76. You know that he was so put down in that history?

A. Oh, yes; everybody connected with the road, I suppose, had a divide. I judge so; there was a divide, I suppose.

387 77. Then the report of the meeting of the citizens in Jackson county as to the money expended on the road was not a correct criterion to judge what moneys were actually expended in the construction of the road?

A. No; the report of the committee is lumped; there are some items that go into details, but there are large amounts that are lumped.

79. Well, I don't care to go into those details.

A. I found, among others, for the purpose of enlightenment as to the cost of right of way—I found that $53,000 is put down as the cost of the right of way.

80. I will get at that directly, Captain, and ask you questions with reference to that. Now, then, as a matter of fact, you have no personal knowledge as to when the Kansas City & Southern Railway Company entered into the possession of the road-bed of the Kansas City, Memphis & Mobile, between Clinton and Osceola, or what the actual value of that road-bed was at the time that the Kansas City & Southern Railway Co. entered into possession of it?

A. No.

81. Now, has the Kansas City & Southern Railway Co. taken possession of any part of that old Memphis & Mobile grade in Cass county or had it taken possession of it at the time you went over it?

A. I was told——

82. I don't care about it now, Captain, if you don't know of your own knowledge.

A. I do not, sir; only from the fact—the only knowledge I have is from the filing of papers and finding stakes set on the line of the

road that I was told were set by the engineers of the Kansas City & Southern Railway Company.

388 83. But you don't know as a matter of fact who set them, do you?

A. I do not.

84. Now, do you know the value of the work done in Cass county, of your own knowledge? Did you ever see any of the Kansas City, Memphis & Mobile officials do any work in Cass county yourself?

A. No.

85. As a matter of fact, you don't know who did that work and under whose direction it was done personally? I am now speaking of your personal knowledge.

A. No.

86. Now, Captain, do you know the value of the work done in Cass county?

A. The present value I have estimated at——

87. I am not speaking of the present value. You say you don't know who did the work?

A. No. Oh, yes, I know the parties who had the contract, and I know they were paid by the Kansas City, Memphis & Mobile Railroad Company.

88. You never saw them paid, did you, Captain?

A. Well, no.

89. You don't know anything about it really except from information you have received, or from documents? That is correct?

A. Yes.

90. Do you know of your own knowledge whether any right of way was ever obtained by the Kansas City, Memphis & Mobile Railroad Co. in Cass county? I mean of your personal knowledge?

389 A. I have no personal knowledge about it.

91. Do you know of your own personal knowledge whether any right of way was ever obtained by that company in Jackson county, of your own personal knowledge?

A. I have not any individualized cases. I made out all the land maps, and they were furnished from my hands to the agents employed by the company in obtaining the right of way, but I cannot cite you to any instance in which I have a personal knowledge of the right of way having been obtained under those papers.

Redirect examination.

By Mr. McCRARY:

92. Was there an old grade over that part of the route between Clinton and Osceola prior to the time when you say the Kansas City & Southern went to work there to construct their road?

A. I can only answer that question by saying that the banks are old — bear the evidence of having been of that date or having

been constructed about that date, and from general notoriety that the Kansas City and Southern have laid their track on the old grade of the Kansas City, Memphis & Mobile.

93. What knowledge had you, if any, at the time the Kansas City, Memphis & Mobile were engaged in the construction of the line that it extended as far down as Osceola, and that they were engaged in grading over that part of the route?

A. I was at Clinton when the work was in progress there, and on a number of occasions talked to Mr. Greenwood, who was their chief engineer.

94. Chief engineer of what company?

A. He was appointed chief engineer of the Clinton &
390 Memphis branch of the Tebo & Neosho railroad.

95. What company was that merged into, if you know?

A. That was afterwards consolidated with the Clinton & Kansas City branch of the Tebo & Neosho railroad, and the joint companies were consolidated into the Kansas City, Memphis & Mobile railroad.

96. Who was chief engineer of the latter company after consolidation?

A. Mr. Greenwood continued to act as chief engineer of the part south of Clinton and Mr. Smith was the chief engineer of this part of the road.

97. What did you learn from Mr. Greenwood as to the grading between Clinton and Osceola?

Objected to as incompetent, irrelevant, immaterial, and hearsay.

98. I don't ask for what he said, but as to the general fact concerning the work in which the company was engaged.

A. Our conversation, when referring to it, spoke of the work when in progress. I can only say in general terms that the work was being prosecuted vigorously at that time.

99. You mean the work between Clinton and Osceola?

A. Yes, sir; the work between Clinton & Osceola. Mr. Greenwood was a citizen of Clinton.

100. With what degree of certainty can you determine by looking at a grade in its present condition that it was constructed prior to the time when the Kansas City & Southern took possession?

A. The banks are all well consolidated and settled, and there are no other grades in the neighborhood anywhere—no other old grade.

391 101. As an expert in that kind of work, when would you say that that grading was originally done from your inspection recently made—how long ago?

A. I would judge it was made at the time the documents here represented it having been made; fifteen or sixteen or twenty years ago—fifteen or sixteen years ago.

102. What official relation did McBeth have with the Kansas City, Memphis & Mobile?

A. He was a director in that company.

103. Do you know of your own knowledge how long the Kansas

City & Southern has been operating its line over the route between Clinton and Osceola? I don't mean now to ask you for what you have heard, but for what you know yourself with regard to that road.

A. The only time I ever passed over the road was in making these investigations.

104. Well, did you know as a matter of fact that that road was there before that?

A. I only know from general notoriety.

105. How long according to general notoriety and common report—how long has the Kansas City & Southern Railway Company been operating its line over that route?

Objected to as incompetent, irrelevant, immaterial, and hearsay.

A. Well, according to general notoriety and common report five or six years, I suppose.

106. Who were the parties who had the contract for the grading between Clinton and Osceola?

392 A. It will be necessary to refer to some documents here. There were a number of persons connected with it.

107. Well, it may not be necessary to do that. Did you know them personally?

A. I had a knowledge of Col. Colt. I knew him personally. He was the contractor who did a large part of that work, and there were other parties not so well known.

108. What part of the route did Col. Colt have his contract for?

A. That part of it through Henry county.

109. And under whom did he have the contract?

A. I suppose under the Tebo and Neosho branch first, and then that was merged into the Kansas City, Memphis & Mobile.

Recross-examination by Mr. O'GRADY:

110. Captain, you say you are an expert and can tell the value of an old grade or any grade of railroad when you see it, or tell the age of it, I mean—the age of any grade when you see it?

A. Yes, sir.

111. You can tell the age of a grade of a railroad when you see it?

A. About; I could not with certainty. I can see whether — is old or new.

112. When a grade is seven years old can you tell whether it is seven years old or fifteen?

A. I think I could.

113. Can you tell whether it is eight years old or fifteen?

A. Yes, sir.

114. Can you tell whether it is nine years old or fifteen?

393 A. Oh, well, in approaching it that way of course my answer would be measurably so. Of course I don't profess to say what the age of an earth embankment is, but I can tell by the appearance of vegetation about how long it had taken to grow, the

brush and young timber to grow on it, and about how long it would take an undisturbed bank to give vegetation of that kind.

115. Are you prepared to say that the entire grade between Clinton and Osceola was not regraded and refixed from beginning to end? Are you prepared to say that it was not when the Kansas City & Southern took possession of it?

A. No; I have not said that. I wouldn't say that. Of course they would fix it up and repair the damage.

116. Did you see any young timber growing upon the embankments of that grade between Clinton and Osceola that would lead you to infer that that grade is about fifteen years old, or fifteen years since it was constructed?

A. No.

117. You did not? Did you see any vegetation on the grade that would lead you to infer that it was fifteen years since that grade was constructed?

A. No.

118. You did not? Then by what criterion did you judge as a civil engineer expert that that grade has been there about fifteen years as it exists now or as it existed at the time you went over it last year?

A Well, the masonry has an old appearance. The banks are well compacted, well consolidaded and settled thoroughly, and everything has an old look.

119. Wouldn't the masonry look about as old if it was seven years old as it would if it were fifteen?

A. No.

394 120. Did you examine the masonry carefully?

A. Not very carefully.

121. Did you stop and go under the culverts and examine the masonry?

A. I did not.

122. How close were you to that masonry?

A. Some of it—a large portion of it—I was not any closer to than on the rear of a car.

123. Do you mean to tell me that you can tell from the rear of a car whether or not the culverts and masonry that you saw were seven years old or fifteen years old?

A. I think I can, sir.

124. You think you can, sir? Then you rode over the entire line between Clinton and Osceola in a car?

A. Yes, sir.

125. At what speed was the car going?

A. Usual speed. They don't make very fast time.

126. At least twenty or twenty-five miles an hour?

A. Fifteen miles, I suppose.

127. What time did you ride over it?

A. During the day.

128. What month of the year?

A. I can't give you the date; it was some time about the 23rd or 24th, or along there, of September, 1887.

129. Then you rode in the passenger coach of the Kansas City and Southern Railway Company?

A. Yes, sir.

130. And whatever distance that passenger train traveled an hour you traveled an hour, if it was twenty or twenty-five miles?

395 A. Yes, sir.

131. The only inspection of culverts and bridge you made along that line you made from the hind end of that car when traveling along at that rate of speed. Is that correct?

A. Yes; that is correct.

132. Now, do you mean to tell me that you can tell the age of a culvert by looking at it from the rear end of a train going at the rate of twenty or twenty-five miles an hour—whether the culvert or masonry is seven or fifteen years old—going at that rate of speed?

A. I could. I can tell you nearly the amount of mason-work in it. I can tell you within a fraction of the amount of timber in a trestle.

133. Was there any trestle-work on the road at the time that the Kansas City & Southern took possession?

A. I don't know.

134. Have you any knowledge as an expert, having traveled over the road, whether there was or not any trestle-work there at that time? There is trestle-work there now, isn't there?

A. Yes, sir.

135. Lots of it. As an expert you went over that road. How old is that trestle-work?

A. Oh, it has all been remodeled.

136. Remodeled, yes. How old is the trestle-work, according to your judgment when you went over it?

A. I judge there was some of it remains of the old work, but I couldn't tell you positively.

137. You have stated now that you think some of it was the remains of the old work.

A. Yes, sir.

138. How much of it?

396 A. I couldn't say that.

139. Can you approximate it?

A. I could not. My object in passing over the road was not for the purpose of finding out what work had been done at present, but the value of the old grade.

140. Now, you say that certain portions of that trestling was part of the original work that was done on that road by the Kansas City, Memphis & Mobile, according to your theories as an expert?

A. According to my knowledge of it.

141. Now, Captain, I ask you this question: Don't you know, as a matter of fact, that the Kansas City, Memphis & Mobile Company never built one inch of a trestle-work between Osceola and Clinton; and don't you know that you are then mistaken in your former testimony when you say that part of the trestle-work was

the remains of what was put there by the Kansas City, Memphis & Mobile?

A. I think a part of it is old work, sir.

142. Are you as certain of that fact, Captain, as you are of any other fact you have testified to in this deposition?

A. Oh, I can't undertake to go into particulars so. It looks to me as if a part of that was a part of the old trestle-work of the Kansas City, Memphis & Mobile.

143. You are equally as certain that that trestle-work, or that a part of it, was a part of the old trestle-work of the Kan- City, Memphis & Mobile as that the culverts and embankments were partly the work of the old Kansas City, Memphis & Mobile, aren't you?

A. I don't quite understand.

397 144. Well, I say you are——

A. I understand your question very well; but I must say the grade of the road is old, the masonry is old, and the trestle-work, I judge a part of it to be equally as old.

145. Now, what is this you said about Col. Colt, that he was one of the contractors?

A. I think so; yes, sir.

146. You mean Col. Colt, of Clinton?

A. Yes, sir.

147. You read the history of St. Clair county? I believe you have so testified.

A. I don't know that Col. Colt's name is mentioned there, sir.

Witness excused and signature waived by Mr. O'Grady and Mr. Gage. It is understood that counsel for Farmers' Loan and Trust Co. may cross-examine, if desired, before close of deposition.

398 STATE OF MISSOURI,)
County of Jackson,) *ss:*

I, Fred. P. Barnett, a notary public within and for the county of Jackson, in the State of Missouri, do certify that in pursuance of the annexed notice came before me, at the law office of Pratt, McCrary, Ferry & Hagerman, room 18, Thayer building, in the city of Kansas, in the county and State aforesaid, William Miller, who was by me sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined, and his examination at the time reduced to writing in short-hand, in my presence, on the day, between the hours, and at the place in that behalf aforesaid; that said deposition was by me truly and correctly transcribed, and the same is now herewith returned, the counsel for the respective parties having waived the signature of the witness.

I further certify that the plaintiffs were present by Pratt, McCrary, Ferry & Hagerman, their attorneys, and the defendants The Kansas City & Southern Railway Company and The Kansas City and Southern Construction Company, by their attorney, John O'Grady, and the defendant The Farmers' Loan & Trust Company,

by its attorneys, Messrs. Gage, Ladd & Small, who waived cross-examination.

My term expires April 24, 1890.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, at my office, in Kansas City, Missouri, this 4th day of February, 1888.

[SEAL.] FRED. P. BARNETT,
Notary Public, Jackson Co., Mo.

399 *Notice to Take Depositions in United States Courts.*

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

UNITED STATES OF AMERICA, *Western District of Missouri*, } ss:

BERTHOLD SCHLESINGER *et al.*
against
THE KANSAS CITY & SOUTHERN RAILWAY CO. *et al.*

You, the above-named plaintiffs, or your attorneys of record, are hereby notified that on the 9th day of October, 1888, the above-named defendants will in the above-entitled cause, at the law office of Southerland Tenney, No. 11 Pine St., in the city of New York, in the county of New York, in the State of New York, take depositions of Amos Tenney, to be used as evidence on the trial of said suit and on the hearing of each and every motion and application therein. Said depositions will be taken because the testimony of said witness is necessary on the trial of said action, and said witness live- more than one hundred miles from the place of trial of said action.

And that the taking of said depositions will be commenced at nine o'clock a. m. of said day, and that the taking of the same will be adjourned and continued from day to day, Sundays excepted, at the same place, until the taking of the same is completed.

Dated this 1st day of October, A. D. 1888.

JNO. O'GRADY,
Attorney for Defendants.

Service of the above notice is hereby accepted and issue of dedimus, filing of interrogatories, and all exceptions as to time are hereby waived this 1st day of Oct., 1888.

J. BRUMBACK & GEO. W. McCRARY,
Attorney of Record for Compl'ts.

400 Depositions of witnesses produced, sworn, and examined on the ninth, tenth, eleventh, and twelfth days of October, 1888, between the hours of nine a. m. and six o'clock p. m. of said days, at the law office of Sutherland Tenney, No. 11 Pine street, in the city of New York, county of New York, and State of New York, before me, William H. Nelson, a notary public within and for the county of Kings, with a certificate filed in New York county; also a notary public in and for the city of New York, county of New York, and State of New York, in a certain cause now pending in the circuit court of the United States for the western district of Missouri, western division, between Berthold Schlesinger *et al.*, plaintiffs, and The Kansas City and Southern Railway Co. *et al.*, defendants.

Amos Tenney, of lawful age, being produced, sworn, and examined on the part of the defendant-, deposeth and saith:

Appearances: John J. Thommasson, for complainants; John O'Grady, for defendants.

By Mr. O'Grady:

Q. State your name and place of residence.
A. Amos Tenney; 87 Madison Ave., New York city.
Q. How long have you lived in the city of New York?
A. Since 1852.
Q. Are you acquainted with the defendant The Kansas City & Southern Construction Co.? If so, how long have you known it?
A. I have known it since its organization.
Q. Are you acquainted with the Kansas City & Southern Railway Co.? If so, how long have you known it?
A. I am. I have known it since its organization, in 1880.
Q. Are you acquainted with one James I. Brooks?
A. I am.

401 Q. I'll ask you to identify the paper which you now hold and which is marked Exhibit No. 1 to your deposition.
A. This is a copy of the original contract made between the owners of the property and James I. Brooks for the purchase of the Kansas City, Memphis & Mobile railroad.

The above question is objected to by counsel for the complainant for incompetency and irrelevancy, and all subsequent questions pertaining thereto or to any other matters are also objected to for the same reasons, and said objections to said testimony shall be renewed on the trial of this cause with the same force and effect as if taken before the notary in these depositions.

Q. Now, state when you saw the original contract of which Exhibit No. 1 is a copy.
A. Immediately after the execution of this contract Mr. Brooks brought it to me at my office in New York and copies of it were taken there; he retained the original.
Q. Was Exhibit No. 1 made then?
A. It was.

Q. In whose possession has Exhibit No. 1 been ever since?

A. In my own.

Q. State whether or not you carefully compared Exhibit No. 1 with the original contract.

A. I did.

Q. Now, state what was done with the original of that contract—that is, was the original assigned to any person; if so, state who.

A. A construction company was formed. The Kansas City and Southern Construction Co. was organized under the laws of
402 Connecticut and Mr. Brooks conveyed to that company by deed all rights he had under the original agreement of which No. 1 is a copy.

Q. State what the Kansas City & Southern Cons'n Co. did in reference to accepting the terms of the original contract, of which No. 1 is a copy.

A. They accepted the deed subject to the original terms of the contract as stated in Exhibit No. 1.

Q. State whether or not the construction company built the road by October, 1880—I mean built a line of road as designated in Exhibit No. 1.

A. They did not.

Q. State what position you then held in the Kansas City & Southern Construction Co.

A. I was the first president of the company for a short time and was managing the affairs of the construction Co. at the time.

Q. Now, state whether or not the construction company refused to go on under the contract Exhibit No. 1, and state fully all the construction Co. did in reference to building or constructing the road under Exhibit No. 1.

A. The const'n Co. employed Mr. J. E. Young as their chief engineer and James I. Brooks was connected with him as the manager in Missouri. They did some engineering—ran two lines partially—and Mr. Brooks came home. I resigned the presidency and he was elected president. He and his Boston friends had raised some $75,000 on subscription. He then made at that time, when he came home, a contract with Naylor & Co., I think, for 5,000 tons of rails, on which he paid $50,000. The balance of the $75,000 or upwards was expended in making the payment for the original agree-
ment, as shown in Exhibit No. 1, and for the engineering ex-
403 penses incurred at that time. None of the iron was ever delivered to any one or to said construction Co. At this time the construction Co. became embarrassed. That was prior to Oct., 1880, and very soon thereafter the subscribers Mr. Brooks had represented that he had in Boston for the stock of the company refused to pay any more money, giving as their reason the fall in the price of steel rails, so as to lose all the $50,000 they had paid on account of steel rails to be delivered. They did nothing of any moment for some weeks after the first refusal of the subscribers to pay until the terms of their contract with the sellers of the road with Brooks had expired and was forfeited on the first of Oct., 1880. The construction company had failed and could not carry out the contract made with

Brooks, which is Exhibit No. 1 to this deposition. They had no assets except the road after the subscribers had refused to pay any more money made by the owners of the road. The construction company held the road conditionally under Exhibit No. 1. The road was then surrendered to the trustees under the terms of the contract Exhibit No. 1. I mean it was surrendered by the construction Co. The trustees accepted the surrender and subsequently, in the month of December, 1880, made a deed to the Kansas City and Southern Railway Co.

Q. I'll now ask you to examine the paper you now hold in your hand and state what it is, paper being marked Exhibit No. 2 to your deposition.

A. I am familiar with the paper. It is in my handwriting. I copied it from the original made and executed by the trustees for the owners of the Kansas City, Memphis & Mobile Railroad Co. executed on the 15 day of Dec., 1880, duly acknowledged and filed and recorded Dec. 16, 1880, in Kansas City, Missouri.

Q. Why was this deed made to the Kansas City and Southern Railway Co. by the trustees?

404 A. I was at and some months previous to that time the secretary & managing director of the Kas. C'y and Southern Railway Co. I employed Mr. J. E. Young to go to Kansas City and see if he could make a purchase of the road after the surrender of the road to the trustees by the construction Co. He finally concluded a contract and conveyance of the property to the Kansas City & Southern Railway Co. on the terms and conditions set forth and provided in the deed which is Exhibit No. 2 in this deposition.

Q. Why did you send Young to get the deed from the trustees when the railway Co. already had a deed from the construction Co.?

A. The construction Co.'s rights under all the conveyances that they had had been forfeited by their own terms, and Mr. Young had represented to me that he had parties who would join him in a contract with the railway company to build a road who were responsible and would advance the money sufficient to secure the deed on the terms stated in Exhibit No. 2; that contract he represented could be made was made and entered into between him and his friends under the name of Smith and Co. and the Kansas City and Southern Railway Co. The Kansas City and Southern Railway Co. immediately took possession of the road; that was during the month of Dec., 1880, and the contractors proceeded to construct the same under the terms of the deed, and the company paid the money—that is, the $25,000 mentioned in Exhibit No. 2 was paid by the railway Co. at the time that the original of Exhibit No. 2 was executed & delivered to the railway Co.—and the balance which was called for under the terms of deed Exhibit No. 2 was fully paid within the time stipulated and the receipts of the trustees given that the whole $40,000 called for had been paid, the last payment

405 being made about ten days prior to the expiration of the stipulated time in Exhibit No. 2. I was managing all the affairs of the railway Co. at that time and caused all the money to be

paid, and personally knew it was paid and personally knew that the forty thousand dollars was paid.

Q. Now, do you know where the original contract made by the trustees with Brooks, of which Exhibit No. 1 is a copy, now is?

A. I have no means of knowing where it is. Brooks had it when he made the deed to the construction Co. and I have not seen it since.

Q. State when Brooks ceased to be president of the construction Co., about?

A. He ceased to be president of the construction Co. on the 17th day of September, 1880. He was discharged or dismissed from the presidency by unanimous vote of the stockholders and directors on that day and Henry Ashley was elected to fill the vacancy. Henry Ashley is now president and director of the construction Co.

Q. State why James I. Brooks was removed from the presidency of the construction Co. by the stockholders and directors at that time.

A. He had by his mismanagement of the affairs of the company and his attempt to issue fraudulent stock never authorized by the company forfeited the confidence of every one connected with it.

Q. State whether or not the construction company ever had a settlement with Brooks in reference to his accounts with the construction company.

A. The company were never able to get any settlement with him. The directors as a body called on him for a rendering and
406 settlement of his accounts, which he refused and neglected to make. All the papers which we could ever get from him was the record book, which had been kept for a time in his office, and when we did get the record book we found that his clerk who kept the records under his direction of the proceedings of the directors had neglected to enter the resolution demanding a settlement of his accounts. We could get no other books or papers from him.

Q. Now state whether or not Brooks was solvent at the time he entered into the contract, of which Exhibit No. 1 is a copy, and at the time when he was ousted from the presidency of the construction Co.

A. He was insolvent at that time. There were one or more judgments here against him at that time which we found out afterward.

Q. State when did the Kansas City and Southern Railway Co. take possession of the assets—that is, the old road-bed of the Kansas City, Memphis & Mobile railroad.

A. Immediately upon the execution of the deed, Exhibit No. 2.

Q. What position did you hold in the Kansas City & Southern Railway Co. at the time it took possession of the old road-bed of the Kansas City, Memphis & Mobile railroad under Exhibit No. 2?

A. I was the secretary of the company, and, by authority of the president and directors, had the general management of all its financial affairs.

Q. Were you secretary and director and had you the management of the financial affairs of the Kansas City and Southern Rail-

way Co. from the time of its organization, June 10, 1880, up to 1882?

A. I was secretary and had the management of its financial affairs including that time.

Q. I'll ask you to state whether Naylor & Co., the complain-
407 ants in this case, made any claim against the Kansas City & Southern Construction Co. for any balance due them prior to the time that the Kansas City and Southern Railway Co. took possession of the assets and old road-bed of the Kansas City, Memphis & Mobile railroad under either the deed from the Kansas City & Southern Construction Co. or under the deed of which Exhibit No. 2 to this deposition is a copy.

A. I never heard of any such claim being made in any way or shape until after December, 1880, when the Kansas City & Southern Railway Co. took possession of the road.

Q. How long after the Kansas City & Southern Railway Co. took possession was it that you heard of the claim of Naylor & Co.?

A. It must have been several months. I should say it was in the spring or early summer of 1881 when I first heard of the claim of Naylor & Co. against the construction Co. I was a director in the construction Co. all the time. The construction Co. was *non est* and nothing being done by them, the construction Co.

Q. State what, if any, knowledge the Kansas City & Southern Railway Co. had of the claim of Naylor & Co., the complainants in this case, against the construction Co. at the time they received the deed from the trustees, of which Exhibit No. 2 is a copy, and when they paid the $40,000 to the trustees for the property to which they received the deed from the construction Co. you have heretofore testified, and when.

Objected to as heretofore for irrelevancy and incompetency.

A. The railway company had no knowledge whatever of any such claim by Naylor & Co. at the time of the transfers referred
408 to. I never heard of any such claim.

Q. I'll ask you to state whether or not the Kansas City & Southern Construction Co. ever had an office in the State of Connecticut.

A. They held two or three meetings there in a railway station and one at — office in Stanford. They never had an office in the State of Connecticut.

Q. Did they ever transact any business in the State of Connecticut?

A. Never transacted any business, except to elect officers.

Q. There is a deed here attached to the complaint in this case, a deed on the 4th May, 1880, between the Kansas City & Southern Construction Co. and the Kansas City & Southern Railroad Co. State what, if anything, you know about that deed.

A. There never was any Kansas City and Southern Railroad Co. organized. That deed was made by Brooks, and never was confirmed or anything done about it. Brooks and others had talked of organizing such a corporation, but never did.

Q. There is a deed attached to the complaint in this case dated the 18th day of September, 1880, between the Kansas City & Southern Construction Co. and the Kansas City & Southern Railway Co. State what was the consideration that passed from the railway Co. to the construction Co. for that deed.

A. The consideration paid for that deed at the time of its execution was one hundred thousand dollars of the income bonds of the Kansas City & Southern Railway Co. Those bonds are still outstanding and held by parties interested in the Kansas City & Southern Construction Co. They all passed to the possession of George B. Ripley, who was the secretary and financial custodian of the assets and property of the Kansas City & Southern Construc-
409 tion Co. at that time; and what has become of the bonds since I have no knowledge.

Q. When did the Kansas City & Southern Construction Co. deliver to Ripley, as secretary & financial agent of the construction Co., the one hundred thousand dollars in income bonds to which you have just testified?

A. They were delivered at the time of the delivery of the deed, the 18th of Sept., 1880.

Q. State why, if you know, that $100,000 of income bonds were delivered by the railway Co. to the construction Co. at the time of the execution of the deed, Sept. 18, 1880.

A. I consulted Mr. Campbell, the president of the railway Co., who is a lawyer, also the other directors, and we decided, in view that the advances made by the construction Co. for the purchase of the property might give them an equitable claim for some consideration, as we knew at that time that they, the construction Co., were about to forfeit their contracts with the trustees of the property, we thought best to pay them a liberal consideration for a quit-claim to the property, and did so by paying them the $100,000 in income bonds.

Cross-examination by Mr. THOMASSON:

Q. Then I understand, Mr. Tenney, that the recited consideration of $250,000 in the deed dated September 18, 1880, was not in reality paid to said construction Co.?

A. That was merely a hypothe-cal amount put into the deed without regard to what was to be paid.

Q. Had you anything to do with the negotiating of that deed; and, if so, who with?

410 A. With W. J. Campbell, president of the Kansas City & Southern Railway Co., and Mr. Henry Ashley, president of said construction Co. I was a director in both of the companies at that time and secretary and financial manager of the railway Co.

Q. When did you first become interested in said construction Co.?

A. At the time of its organization, in the latter months of 1879 or the first months of 1880.

Q. And from that time to the present have you been interested in said construction Co.?

A. I have been a director of it ever since.

Q. Did you ever yourself inspect the road-bed grade, masonry, bridges of the Memphis, Kansas City & Mobile Railway Co.; if so, when did you?

A. I never inspected them.

Q. Did I understand you to say that that was the only property the Kansas City & Southern Construction Co. had?

A. It is the only property that I ever knew them to have, except the $100,000 income bonds paid them by the railway Co., as hereinbefore testified to.

Q. Has any interest been paid on those income bonds?

A. Not to my knowledge. I am sure the railway company never paid any.

Q. Did you have any inquiry made, as an officer of said railway Co., as to the value of the road-bed grade, masonry, bridges, the right of way of the Kansas City, Memphis & Mobile railway prior to the alleged transfer to your railway Co.?

A. I have no recollection of any inquiry being made. The question of value was frequently discussed by the officers of the railway Co., at various times.

411 Q. Were you present at those discussions as an officer of said railway Co.?

A. I was present and entered into many such discussions.

Q. How many meetings of the directors of said construction Co. did you attend prior to the alleged transfer to said railway Co. of such property and where?

A. In the early months of the year 1880 I attended several meetings of the construction Co., some in Boston and some in New York, until some time in June or July of 1880 the company practically failed, they lost all the money they had, the subscribers refused to go on, and very little business was done after that. The early meetings were held at James I. Brooks' office, at Boston, and in the office of Mr. Parker, who was a director, in Devonshire St., Boston, and the meetings held here at Mr. Geo. B. Ripley's office, who was the secretary of said construction Co.

Q. Did Mr. Brooks have the usual powers of a president to make contracts for said construction Co. with *o*f without the vote of the directors?

A. I think he did until he was discharged from the office of president.

Q. How much work had been done the said Kansas City, Memphis & Mobile Railroad Co. before your said railway Co. took possession of it?

A. I have no personal knowledge of how much work had been done except from the reports of Mr. Young, our engineer.

Q. I show you a contract dated July 7th, 1884, between Frank M. Green and others, in which the value of the old grade is placed at $67,000. Does not that refer to the property of which we speak and to which you testified to as being the only property

412 which your said construction Co. owned?

A. This contract was made after I had surrendered the

control of the property to Colonel Bailey and I don't know anything about it.

Q. Will you testify that the old grade referred to in this contract is not the same as that which you referred to as being the only property owned by your said construction Co.?

A. So much of the old grade as Colonel Bailey used in his construction of the road was there; how much he used I don't know.

Q. Do I understand you to say that you, as a director of said construction Co. from 1879 to the present time, did not know that Mr. Brooks was contracting for rails and other materials for the use of said construction Co.?

A. I did know that he made the contract with Naylor & Co., but I was not a party to the transaction and objected in a letter against his paying the last $25,000 on account of the purchase of rails.

Q. When did you first learn it and when did you protest? Please produce a copy of the letter or account for its absence.

A. Mr. Brooks was raising money at that time and wrote on to Mr. Ripley, who was raising money at that time for the construction Co., for more money to pay the last $25,000 on the rails. I wrote a letter to either Mr. Brooks or Mr. Parker, who was a director—I now forget which—objecting to make any further payment on the rails until they were delivered, as the money that they had was needed for work on the road under their contract; but my objections were overruled and they paid the last $25,000. I first learned two or three days after the contract was made, within a short time after, that there was a decline in rails and Naylor & Co. demanded another payment of $25,000, to which I objected.

413 Q. Where was the meeting held at which you allege a unanimous vote was given by the stockholders & directors of said construction Co. removing Mr. Brooks as president of said company?

A. The meeting was an adjourned meeting from the one held in Stanford to one held in New York. There were present 1,395 shares of the stock and a majority of the board of directors. I meant in my direct a unanimous vote of all present, fifteen hundred shares being the entire capital. We at that meeting elected Henry Ashley as president of the company in place of Mr. Brooks.

Q. Since the alleged transfer to your said railway Co. you state said construction Co. has had no property.

A. None to my knowledge except the $100,000 income bonds paid, as heretofore testified to, to Mr. Ripley, the secretary. What became of those I don't know.

Q. Were you one of the original incorporators of the said construction Co.?

A. I was.

Q. Was you one of the original incorporators of the Kansas City & Southern Railway Co.?

A. I think I was not; I can't say positively.

Q. Then all the property that the construction Co. held you claim has passed into the hands of the Kansas City & Southern Railway Co. by the alleged transfers you have testified to?

A. Yes; except the $100,000 of income bonds paid by said railway Co. to said construction Co.

Q. You state those bonds were paid in September, 1880. Has nothing ever been done by said construction Co. since then; and, if so, what?

A. I don't recollect any business that the said construction Co. did after that in any form. I know nothing about what
414 became of said income bonds except what Mr. Ripley told me—that there was a judgment obtained against the construction Co. for some $20,000, as near as I can remember, and my impression is that he said he gave some of these bonds, how many I don't know, as collateral for the judgment.

Redirect examination.

By Mr. O'Grady:

Q. Mr. Tenney, will you give me as briefly as possible a history of the contract that Brooks made with Naylor & Co., the complainants in this case, for the 5,000 tons of steel rails and on which the fifty thousand dollars was paid, as you testified to.

A. Mr. Brooks or one of the Boston directors informed me of this contract and sent or brought me a copy of it, which was the first I knew that such a purchase was being made. $25,000 in cash was paid to Naylor & Co., the rails to be delivered from Europe. Rails began to decline very soon after the purchase, and long before any rails were delivered or were to be under the contract they called for another instalment of the payment under what they seemed to be the provisions of the contract. Mr. Ripley and I were notified of this second call and the Boston parties wanted us to help them out with part of the money. I objected to their doing so. None of the rails were ever delivered, and the money was a dead loss and it bankrupted the company. They sold the rails and they claimed there was a loss, and this claim which they now seek to enforce against the Kansas City and Southern Railway Company is what Naylor & Co. claim to have lost under their contract with that company. It was in the early spring of 1880 when I first heard of the Naylor contract.

Adjourned to Oct. 11, 1888, at 10 a. m.
Adjourned to Oct. 12, 1888, at 10 a. m.

415 Redirect examination resumed.

By Mr. O'Grady:

Defendant now offers certified copy of No. 2 and asks that it be duly identified and marked as an exhibit to this deposition, which is done accordingly and marked Exhibit No. 3. Defendant offers certified copy of deed from John D. Bancroft and others, trustees, to James I. Brooks, dated January 13, 1880, and asks that the same may be attached to these depositions as an exhibit thereto, which is accordingly done, and said certified copy is marked Exhibit 4 to these depositions.

Q. Mr. Tenney, there are certain conditions in this deed, Exhibit No. 4, which I'll read to you: "The said party of the second part is to build said railroad from Kansas City to Harrisonville or Belton, as said second party may elect, on or before January 1, 1881, so as to be ready for use of the railroad, and also to build said railroad to the coal fields of Bates county, to a point south of Butler, on or before July 1, 1881, so as to be ready for like use as the aforesaid, and also that the sum of $50,000 shall be expended in the construction of a road-bed for said railroad commencing at Kansas City and running southwardly." Now, state if those conditions in that deed were ever fulfilled by the construction Co.

A. They were never fulfilled by the construction Co.

Q. Was any part of that road ever built in compliance with the provisions of that deed, Exhibit No. 4, as embodied in the last preceding question?

A. All that was ever done by the construction Co. towards building the road was some engineering, running two lines and not to exceed one thousand dollars' worth of work done, except the engineering expenses.

416 Q. Was the sum of fifty thousand dollars expended in the construction of a road-bed as provided in said deed, Exhibit No. 4?

A. It was not; not to exceed one thousand dollars of that amount, as I have testified.

Q. Now, when the surrender took place from the construction Co. to the trustees, as specified in Exhibit No. 1 and Exhibit No. 4, was the property specified in Exhibits No. 1 and Exhibit No. 4 surrendered in accordance with the terms of such exhibits surrendered at one time? If so, state all about such surrender, what the construction Co. did, and state fully the financial condition of the construction Co. and why the surrender to the trustees was made.

A. The construction Co. failed in the summer of 1880, early in the summer, but they kept one or two engineers to work during the summer months, part of the time. Early in September of that year they gave up all hope of being able to comply with their contract with the trustees and proposed to sell the road to the railway Co. They abandoned their contract through instructions to Mr. Young, and he commenced negotiations under my instructions as financial agent of said railway Co. and procured the deed of Dec., 1880, from the trustees, as hereinbefore stated in my examination, the trustees of the original owners of the Kansas City, Memphis & Mobile railroad having accepted the surrender of the property from the construction Co.

Recross-examination.

By Mr. THOMASSON:

Q. What you state to-day as to the work done on said old Memphis railroad only applies to what said construction company did?

A. It only applies to the work the construction company
417 did. There was considerable work done prior to the purchase of the property by the old said Memphis road.

Q. Mr. Tenney, were not the same parties who were interested in said construction Co. virtually the same parties, excepting Mr. Brooks, who formed the Kansas City & Southern Railway Co.?

A. A majority of the parties who organized the railway Co. never had anything to do with the construction Co.

Q. But I understand you to say that you were a director in both said construction and railway companies from their respective organizations?

A. I was, and managing director and financial agent of said railway Co.

Q. What, if anything, was paid into the treasury of said construction Co. by your said railway Co. for the property you state the latter acquired?

A. One hundred thousand dollars of the income bonds of said railway Co., and such were paid to quiet the title of the said railway Co.

AMOS TENNEY.

Sworn to and subscribed before me this 12th day of October, 1888.

[SEAL.] WM. M. MILLER,
Notary Public, Kings Co.

Certificate*d* filed in New York Co.

418 I, Wm. M. Nelson, a notary public in and for the city of New York, county of New York, and State of New York, do certify that, in pursuance of the annexed notice, came before me, at the law office of Sutherland Tenney, No. 11 Pine street, in the city of New York, county of New York, and State of New York, Amos Tenney, of lawful age, who was by me duly sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid, and that he was examined and his examination reduced to writing by me and in my presence and subscribed and sworn to by him on the days, between the hours, and at the place first aforesaid, and said deposition is now herewith returned.

And I further certify that the said Amos Tenney is a resident of the city of New York, county of New York, and State of New York.

Given at the city of New York, county of New York, and State of New York, this twelfth day of October, eighteen hundred and eighty-eight.

[SEAL.] WM. M. NELSON,
Notary Public, Kings County.

Certificate filed in New York county, and notary public in and for the city and county of New York.

419 Copy.

KANSAS CITY, MO., *Nov.* 1, 1879.

We, the undersigned, owners of the Kansas City, Memphis & Mobile R. R., hereby agree to sell to James I. Brooks or his assigns

our interest in the Kansas City, Memphis & Mobile R. R. upon the following terms, to wit:

One thousand dollars in cash, balance to be payable in cash or acceptable notes upon the completion of a satisfactory investigation of title; said investigation to be made within twenty days from this date, the whole payment to amount to nineteen thousand one hundred and twenty-five dollars.

Said Brooks to give a guaranty to build the road from Kansas City to Belton or Harrisonville on or before Oct. 1, 1880, and to build a line either from Belton or Harrisonville to the coal fields in Bates county within eighteen months from this date. We hereby agree to deliver a good and proper assignment of such road free of all incumbrances. In case the said Brooks or assigns fails to build the road as above, all payments thereon to be forfeited and said road to revert to us.

We give a full release upon such forfeiture, upon satisfactory evidence that money has been secured to enable said Brooks or assigns to complete said road as agreed, to enable said Brooks or assigns to raise money upon the securities of such contemplated road; the said Brooks or assigns to have the right to vary the line of said road as may be desirable between Kansas City & the coal field; this contract to be of no effect unless signed by two-thirds of amount in ownership.

420	E. L. MARTIN & CO.	$500 00.
	WM. HOLMES.	300 00.
	J. W. WOOD.	1,000 00.
	GATES & KENDALL.	300.
	WARRINER, GREGGORY & CO.	500 00.
	TRUMBULL, REYNOLDS & ALLEN.	500 00.
	LOUIS HAMMERSLOUGH.	300 00.
	BULLENE, MOORES & EMERY.	1,000 00.
	M. DIVELY.	500 00.
	SMITH & KEATING.	1,000 00.
	JAMES P. HOWENSTEIN, *Rec. First National Bank.*	
	A. M. ALLEN.	300 00.
	THOMAS McNAMARA.	300 00.
	SLAVENS & OBURN.	1,000 00.

Exhibit No. — to deposition of Amos Tenney, Wm. M. Nelson, notary.

421 Whereas the Kansas City, Memphis and Mobile R. R. Co. with all its road-bed, rights of way, & appurtenances & property & rights of property whatsoever connected with the said railroad with all the franchises of the Kansas City, Memphis & Mobile R. R. Co. were by deed dated Jan'y 13th, A. D. 1880 sold and con-

veyed by the undersigned trustees to one James I. Brooks on certain conditions contained and specified in said deed, and

Whereas, the title to said property subject to the conditions has by sundry mesne conveyances passed to and vested in & is now owned and held by the Kansas City & Southern Railway Company, and

Whereas said last-named company has not been able to comply with and perform said conditions within the time specified in said first-named deed for their performance but is now willing to deposit and has deposited with the said trustees the sum of $25,000 as a guaranty by said last-named company of the good faith of its purpose to build a railroad southeasterly from Kansas City Missouri through the coal-fields of Henry county Missouri and the iron-fields of St. Clair county Missouri, the receipt of which sum of twenty-five thousand dollars by said trustees is hereby acknowledged, and

Whereas, since the making of said deed to said Jas. I. Brooks, various sums of money have been expended for rights of way, for engineering and other necessary expenses connected with the enterprise of building said railroad, in addition to the purchase price paid to said trustees on the execution of the said first-named deed by them and

Whereas the owners of more than two-thirds of the money and shares furnished by the persons and firms in the deed of said property to said trustees dated April 27, 1877, have directed the undersigned trustees to execute and deliver this instrument to
422 said Kansas City & Southern Railway Company,

Now, therefore, in consideration of the premises and the sum of one dollar in hand paid the receipt of which is hereby acknowledged it is agreed stipulated and covenanted by and between said trustees, for themselves and their said beneficiaries and said Kansas City & Southern Railway Company as follows,

1st. The conditions provided and expressed in said deed of said trustees to said James I. Brooks are hereby annulled, extinguished and the said Kansas City and Southern Railway Company are hereby forever released and discharged from the performance of the same or any part thereof, and in lieu the following conditions are hereby provided that is to say, said trustees or a majority of them shall as said railroad from Kansas City Mo. southeasterly through the coal-fields of Henry county Mo. & the coal-fields of St Clair Co. Mo. shall be constructed pay out said twenty-five thousand dollars on the estimates and orders made and given in the building of said road by the chief engineer of said K. C. & S. R. W. Co. & as soon as said $25,000 is so paid out and the additional sum of fifteen thousand dollars is expended by said last-named Co. in the building of said road the last-named company shall hold said property so con-

veyed free from any and all claims of whatsoever kind on the part of said trustees or their beneficiaries or any of them.

2nd. It is further provided and covenanted that if said last-named Co. shall not expend the full sum of $25,000 in the building of said railroad before July 1, 1881, then so much of said $25,000 so deposited as shall on the day last aforesaid be unexpended shall be forfeited to and become the money and property of said trustees for the benefit of their beneficiaries.

3rd. It is further provided and covenanted that as soon as said $25,000 so deposited shall be paid out and as soon as the
423 chief engineer of said last-named company shall make the certificate of the expenditure by said last-named company of said $15,000 shall be expended before Oct. 1, 1881, then said trustees shall deliver to said last-named company an instrument in writing duly executed and acknowledged evidencing the full compliance with and performance of all the conditions herein contained by said last-named company and if the sum of forty thousand ($40 M) dollars shall not as above provided be expended by said Co. before Oct. 1st 1881, then said property shall revert to said trustees as by said deed to said Brooks is provided.

In testimony whereof the said trustees Thos. K. Hanna, Benj. McLean & John D. Bancroft have hereunto set their hands and seals this fifteenth day of Dec'r 1880.

(Signed) THOS. K. HANNA. [SEAL.]
BENJ. McLEAN. [SEAL.]
JOHN D. BANCROFT. [SEAL.]

Duly acknowledged and recorded Dec. 16, '80, & personally signed by more than ¾ of the owners.

Exhibit No. 2 to deposition of Amos Tenney, Wm. M. Nelson, notary. [SEAL.]

424 Whereas the Kansas City, Memphis and Mobile railroad with all its road-bed rights of way and appurtenances and property and rights of property whatsoever connected with said railroad with all the franchises of the Kansas City, Memphis & Mobile Railroad Company were by deed dated January 13th A. D. 1880, sold and conveyed by the undersigned trustees to one James I. Brooks and certain conditions expressed and contained in said deed and whereas the title to said property subject to the said conditions has by sundry mesne conveyances passed to and vested in and is now owned and held by the Kansas City and Southern Railway Company, and

Whereas said last-named company has not been able to comply with and perform said conditions within the times specified in said first-named deed for their performance, but is now willing to deposit

and has deposited with said trustees the sum of twenty-five thousand dollars as a guaranty by said last-named company of the good faith of its purpose to build a railroad southeastwardly from Kansas City Missouri through the coal-fields of Henry County, Missouri and the iron-fields of St. Clair county Missouri, the receipt of which sum of twenty-five thousand dollars by said trustees is hereby acknowledged and whereas since the making of said deed to said James I. Brooks various sums of money have been expended for rights of way, for engineering and other necessary expenses connected with the enterprise of building said railroad in addition to the purchase price paid to said trustees on the execution of said first-named deed by them and whereas the owners of more than two-thirds of the money and shares furnished by the persons and firms named in the deed of said property to said trustees dated
425 April 27th A. D. 1877, have directed the undersigned trustees to execute and deliver this instrument to said Kansas City and Southern Railway Company, Now, therefore, in consideration of the premises and the sum of one dollar to said trustees by said Kansas City & Southern Railway Company in hand paid the receipt whereof is hereby acknowledged it is agreed stipulated and covenanted by and between said trustees for themselves and their said beneficiaries and said Kansas City and Southern Railway Company as follows:

1. The conditions provided and expressed in said deed of said trustees to said James I. Brooks are hereby annulled, rescinded and extinguished and the said Kansas City and Southern Railway Company are hereby forever released and discharged from the performances of the same or any part thereof and in lieu thereof the following conditions are hereby provided, that is to say, said trustees or a majority of them shall as said railroad from Kansas City, Missouri southeastwardly through the coal-fields of Henry county Missouri and the iron-fields of St. Clair county Missouri shall be constructed pay out said twenty-five thousand dollars on the estimates and orders made and given in the building of said railroad by the chief engineer of said Kansas City and Southern Railway Company, and as soon as said twenty-five thousand dollars is so paid out and the additional sum of fifteen thousand dollars is expended by said last-named company in the building of said railroad then said last company shall hold said property free from any and all claims of whatsoever kind on the part of said trustees or their beneficiaries or any of them.

2. It is further provided and covenanted that if said last-named company shall not expend the full sum of twenty-five thousand dollars in the building of said railroad before July 1st, A. D.
426 1881, then so much of said twenty-five thousand dollars so deposited as shall on the day last aforesaid be unexpended shall be forfeited to and become the money and property of said trustees for the benefit of their beneficiaries.

3. It is further provided and covenanted that as soon as said twenty-five thousand dollars so deposited shall be paid out and as soon as the chief engineer of said last-named company shall make his certificate of the expenditure by said last-named company of said additional fifteen thousand dollars in the building of said railroad which sum of fifteen thousand dollars shall be expended before October 1st, A. D. 1881, then said trustees shall deliver to said last-named company an instrument of writing duly executed and acknowledged evidencing the full compliance with and performance of all the conditions herein contained by said last-named company, and if the sum of forty thousand dollars shall not as above provided be expended by said company before October 1st, A. D. 1881, then said property shall revert to said trustees as by said deed to said Brooks is provided.

In testimony where- the said trustees Thomas K. Hanna, Benjamin McLean and John D. Bancroft have hereunto set their hands and affixed the seals this 15th day of December A. D. 1880.

THOMAS K. HANNA, [SEAL.]
BENJAMIN McLEAN, [SEAL.]
JOHN D. BANCROFT, *Trustees.* [SEAL.]

427 STATE OF MISSOURI, } ss:
Jackson County, }

Be it remembered that Thomas K. Hanna, Benjamin McLean, and Jno. D. Bancroft, who are personally known to the undersigned, a notary public within and for said county, to be the same persons whose names as trustees are signed to the foregoing instrument of writing as parties thereto, this 15th day of December, A. D. 1880, personally appeared before me and acknowledged that they executed and delivered the same as their voluntary act and deed and as the voluntary act and deed of the beneficiaries for the uses and purposes therein contained.

In witness whereof I have hereunto set my hand and affixed my notarial seal. Done at office, in Kansas City, Missouri, this 15th day of December, A. D. 1880. My term expires January 8th, 1883.

[SEAL.] JOHN H. RICE,
Notary Public.

We, the undersigned, being more than two-thirds in amount of the purchasers of the road-bed, rights of way, masonry, and of the property formerly owned and belonging to the Kansas City, Memphis and Mobile Railroad Company conveyed by John D. Bancroft to Thomas K. Hanna, Benjamin McLean, and John D. Bancroft, trustees, by deed dated April 27th, A. D. 1877, and duly recorded, and assignees of said purchasers, do hereby, in accordance with the provisions of said deed, order and direct our trustees, Thomas K. Hanna, Benjamin McLean, and John D. Bancroft, to execute, acknowledge, and deliver to the Kansas City and Southern Railway Company the foregoing and annexed instrument of writing upon

the deposit by said company with said trustees of the sum of twenty-five thousand dollars, as is in said instrument *is* provided.

428 Witness our hands this 15th day of December, A. D. 1880.

$500.00.	E. L. MARTIN & CO.
500.00.	WARRINER, GRAGGORY & CO.
300.00.	WM. HOLMES.
300.00.	JOHN C. GAGE.
500.00.	TOOTLE, HANNA & CO.
500.00.	HOWARD M. HOLDEN.
1,000.	H. M. HOLDEN, *Assignee of Edward Allen.*
500.	H. M. HOLDEN, *Assignee of C. E. Robinson.*
300.	H. M. HOLDEN, *As-ignee of D. M. Jarboe.*
1,000.	H. M. HOLDEN, *Assignee of J. D. Bancroft.*
500.	BENJ. McLEAN.
1,000.00.	PLANKINGTON & ARMOURS.
1,000.00.	SMITH & KEATING.
1,000.00.	SLAVENS, MANSUR & CO.
1,000.00.	BULLENE, MOORES & EMERY.
500.00.	TRUMBULL, REYNOLDS & ALLEN.
300.00.	LOUIS HAMMERSLOUGH.

Filed for record and duly recorded in my office on this 16th day of Dec., A. D. 1880, at 3.15 p. m.

CHAS. D. LUCAS, *Recorder*,
By E. F. HEDGES, *D. R.*

STATE OF MISSOURI, }
County of Jackson, } *ss:*

I, Chas. D. Lucas, recorder of deeds within and for the county of Jackson aforesaid, do hereby certify that the above and foregoing is a full, true, and perfect transcript of the record of the deed, with acknowledgments and note of record thereon, from Thomas

429 K. Hanna *et al.*, tr's, to Kansas City & Southern R'y Co. as the same now remains of record in my office, in Book Series B No. 52, on page 283 and following.

In testimony whereof I hereunto set my hand and affix the seal of said office, at Kansas City, Mo., this 31st day of Jan'y, A. D. 1885.

C. D. LUCAS,
Recorder of Deeds,
By E. F. HEDGES,
Depity Recorder.

Exhibit No. 3 to deposition of Amos Tenney, Wm. M. Nelson, notary.

430 Whereas the Kansas City Memphis and Mobile railroad with all its road-bed, rights of way, appurtenances and property, and rights of property whatever connected with said railroad, with all the franchises of the Kansas City Memphis & Mobile Railroad Company were by deed dated April 27th A. D. 1877 and recorded in the recorder's office for Jackson county Missouri at Kansas City April 30th A. D. 1877 in Book B # 27 on pages 59, 60, 61 & 62 thereof conveyed to the undersigned Thomas K. Hanna Benjamin McLean and John D. Bancroft as trustees, and whereas the present owners of more than two-thirds of the moneys and shares furnished by the persons and firms named in said deed for the purchase of said property have directed said undersigned trustees as provided in said deed to sell said property to James I. Brooks on the terms and conditions herein named for the sum of nineteen thousand one hundred and fifty-six and $\frac{87}{100}$ dollars. Now, therefore, know all men by these presents, that we, the said trustees parties of the first part, for and in consideration of the sum to us in hand paid by said James I. Brooks, party of the second part, the receipt of which is hereby acknowledged, have this day remised, released, conveyed, transferred and forever quitclaimed to said party of the second part said railroad, rights of way, road-bed, appurtenances property, rights of property and franchises. To have and to hold the same unto him the said party of the second part and to his heirs and assigns forever, subject however to the following conditions: Said party of the second part is to build said railroad from Kansas City to Harrisonville or Belton as said second party may elect on or before January 1st A. D. 1881, so as to be ready for use as a railroad and also to build said railr-ad to the coal fields
431 of Bates county to a point south of Butler on or before July 1 A. D. 1881, so as to be ready for like use as aforesaid and if said second party shall fail to build said railroad to said coal fields as aforesaid, then the property hereby sold as aforesaid shall revert to said first part and reinvest in them the same as they now hold the same provided however, that as soon as said second party shall expend the sum of fifty thousand dollars in the construction of a road-bed for said railroad commencing at Kansas City and running southwardly then the said provision for a reversion of said property as aforesaid shall become null and void and of no effect whatever and upon such expenditure being made in the building of said railroad as aforesaid by said second party of said sum of fifty thousand dollars then said trustees are to execute to said second party or his assigns an instrument in writing acknowledging the waiver and extinguishment of said forfeiture. In the event of a disagreement between the said trustees and said second party as to the expenditure in fact by said second party of said fifty thousand dollars as aforesaid, as said second party may hereafter claim, then said trustees and said second party shall each select an arbitrator and they in case of a disagreement between them shall select a third arbitrator, and in case either party refuses to select an arbitrator, then the arbitrator chosen by the other party shall select two additional arbitrators, and the arbitrators selected in any of the above-mentioned

modes shall determine whether such expenditure has been made by said second party and such determination of such arbitrators shall be binding on both parties, and may be enforced by judgment as provided by the laws of this State. Said first party covenants
432 and warrants to and with said second party that they the said trustees have not in anywise encumbered said property, and that the same is free from all encumbrances done or suffered by them.

Given under our hands and seals this 13th day of January, A. D. 1880.

THOMAS K. HANNA, [SEAL.]
BENJAMIN McLEAN, [SEAL.]
JOHN D. BANCROFT, [SEAL.]
Trustees.

STATE OF MISSOURI, } ss:
County of Buchanan, }

Be it remembered that on this 14th day of January, A. D. 1880 before the undersigned, a notary public within and for the county of Buchanan aforesaid, personally came Thomas K. Hanna, one of the trustees mentioned in the within and foregoing instrument of writing and who is personally known to me to be the same person whose name is subscribed to the within and foregoing instrument of writing as a party thereto, and acknowledged the same to be his act and deed for himself and as such trustee and to be the act and deed of his beneficiaries for the purposes in said instrument of writing mentioned.

In testimony whereof I have hereunto set my hand and affixed my official notarial seal, at my office, in St. Joseph, the day and year first above written; and I further certify that my notarial commission expires January 25th, 1883.

[SEAL.] JOHN F. TYLER,
Notary Public.

433 STATE OF MISSOURI, } ss:
County of Jackson, }

Be it remembered that Benjamin McLean and John D. Bancroft, who are personally known to the undersigned, a notary public within and for the county of Jackson aforesaid, to be the persons whose names are subscribed to the foregoing deed as parties thereto, this day appeared before me and acknowledged that they for themselves as such trustees and for their said beneficiaries executed and delivered the same as their voluntary act and deed as such trustees and as the voluntary act and deed of their said beneficiaries for the uses and purposes therein contained. My notarial commission expires February 19, 1883.

In testimony whereof I have hereunto set my hand and affixed my official notarial seal this 13th day of January, A. D. 1880.

[SEAL.] DAN. B. HOLMES,
Notary Public.

We, the undersigned, being more than two-thirds in amount of the purchasers of the road-bed, right of way, masonry, and other property formerly belonging to the Kansas City, Memphis & Mobile Railroad Company, conveyed by John D. Bancroft to Thomas K. Hanna, Benjamin McLean, and John D. Bancroft, trustees, by deed dated April 27th, 1877, and duly recorded, and assignees of such purchasers, do hereby, in accordance with the provisions of said deed, order and direct said trustees to execute and deliver to James I. Brooks, of Boston, Massachusetts, a deed of said property conveying the same to said Brooks upon the payment to them by said Brooks of nineteen thousand one hundred and fifty-six $\frac{87}{100}$ dollars, such deed to be the same whereto this is annexed or similar in substance.

434 Witness our hands this January 13th, 1880.

$300.00.	JOHN C. GAGE.
500.	E. L. MARTIN & CO.
1,000.	J. W. WOOD.
500.	BENJAMIN McLEAN.
500.	HOWARD M. HOLDEN.
1,000.	HOWARD M. HOLDEN, *Assignee of Edward H. Allen.*
500.	HOWARD M. HOLDEN, *Assignee of C. E. Robinson.*
300.	HOWARD M. HOLDEN, *Assignee of D. M. Jarboe & Co.*
1,000.	HOWARD M. HOLDEN, *Assignee of John D. Bancroft.*
1,000.	HOWARD M. HOLDEN, *Assignee of Slavens, Mansur & Co.*
300.	LOUIS HAMMERSLOUGH.
500.	WARRINER, GREGORY & CO.
300.	GATES & KENDALL.
1,000.	BULLENE, MOORES & EMERY.
200.	FRANCIS FOSTER.
500.	MICHAEL DIVELY.
1,000.	PLANKINGTON & ARMOUR.
1,000.00.	SMITH & KEATING.
500.	TRUMBULL, REYNOLDS & ALLEN.
300.	WILLIAM HOLMES.
300.	A. M. ALLEN.
500.	TOOTLE, HANNA & CO.

Filed for record and duly recorded in my office on this 15th day of January, 1880, at 12.10 p. m.

CHAS. D. LUCAS, *Recorder*,
By W. H. WINSHIP, *D. R.*

435 STATE OF MISSOURI, }
County of Jackson, } *ss*:

I, Chas. D. Lucas, recorder of deeds within and for the county aforesaid, do hereby certify that the foregoing is a true and perfect

transcript of the record of the deed, acknowledgment, and note of record thereon from Thomas K. Hanna *et al.* to James I. Brooks as the same now remains of record in my office in Book B # 38, on page 284 and following.

In witness whereof I hereunto set my hand and affix the seal of said office, at Kansas City, Mo., this 23rd day of July, A. D. 1884.

[SEAL.] CHAS. D. LUCAS,
Recorder of Deeds.

Exhibit No. 4 to deposition of Amos Tenney. Wm. M. Nelson, notary.

436 *Notice to Take Depositions in U. S. Courts.*

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

UNITED STATES OF AMERICA, *Western District of Missouri,*

BERTHOLD SCHLESINGER *et al.*, Complainants,
against
KANSAS CITY AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

You, the above-named defendants, or John O'Grady and C. O. Tichenor, your attorneys of record, are hereby notified that on Tuesday, the 27th day of November, A. D. 1888, the above-named complainants will, in the above-entitled suit, at the law office of Hannt & Casey, in the town of Clinton, in the county of Henry, in the State of Missouri, take depositions of J. B. Colt, to be used as evidence on the trial of said suit and on the hearing of each and every motion and application therein.

And that the taking of said depositions will be commenced at nine o'clock a. m. of said day, and that the taking of the same will be adjourned and continued from day to day, Sundays excepted, at the same place, until the taking of the same is completed.

Dated this 12th day of November, A. D. 1888.

J. BRUMBACK AND
GEO. W. McCRARY,
Attorneys for Complainants.

Service of the above notice is hereby accepted and issue of dedimus, filing of interrogatories, and all exceptions as to time are hereby waived this — day of November, 1888.

C. O. TICHENOR,
Attorneys for Defendants.

437 *Deposition.*

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

BERTHOLD SCHLESINGER *et al.*, Complainants,
vs.
KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

Deposition of witness produced, sworn, and examined on the 27th day of November, in the year of our Lord one thousand eight hundred and eighty-eight, between the hours of nine o'clock in the forenoon and six o'clock in the afternoon of that day, at the law office of Gannt & Casey, in the town of Clinton, in the county of Henry, and State of Missouri, before me, Walter E. Owen, a notary public of said Co., in a certain cause now depending in the circuit court of the United States for the western district of Missouri, western division, between Berthold Schesinger *et al.*, complainants, and The Kansas City and Southern Railway Company *et al.*, defendants, on the part of the complainants, J. B. Gannt appearing *for* counsel for the complainants and John O'Grady appearing as counsel for the defendants.

J. B. COLT, of lawful age, being produced, sworn, and examined on the part of the complainants, deposeth and saith:

My name is James B. Colt. I am fifty-nine years old. My residence is Clinton, Henry county, Missouri. I am a farmer and a railroad contractor. I was one of the contractors who built the grade of what was known as Clinton and Memphis branch of the Tebo and Neosho railroad from Clinton, in Henry county, to Osceola, in St. Clair county, Missouri. I constructed about twenty miles of said grade. Captain William Weaver built the remainder—
438 about five miles. I made the contract to build that grade with A. D. La Due. He was acting as general superintendent of construction.

Q. State what they paid you for constructing that grade by the yard.

Ans. My contract price was, I think, twenty-seven cents per yard, with a five-hundred-foot free haul; after five hundred feet a cent per yard until it made the excavation price. My whole contract price was between seventy-five and eighty thousand dollars, to the best of my knowledge. I am not certain of the exact amount, as I have lost my book.

Q. Have you your original books and estimates upon which you were paid?

Ans. No, sir: I have not.

Q. Can you state what became of the books?

Ans. When I moved from here to St. Louis I was not here, and the folks left them in the garret, and when I came back I could not find them, and have never seen them since.

Q. State what railroad company, if any, is now using and controlling this grade which you built about sixteen years ago.

Ans. The Kansas City & Southern, I believe.

Q. State, if you know, about how long they have been running this road.

Ans. About five years.

Q. State, if you know, who built the stone-work for that road—pillars, culverts, and other necessary stone-work.

Ans. Frank McKabe. He is dead.

Q. State how much stone-work he did.

Ans. McKabe did all the stone-work on my contract. I cannot say further.

Q. State the character of that work, whether good and substantial.

Ans. It was good sandstone work.

439 Q. Was this very heavy stone-work?

Ans. You might say it was, as heavy as any I have ever seen. Some of wall were as heavy as I have ever seen, two and — half to three feet.

Q. At the time the Kansas City and Southern took charge of this grade and stone-work what was its value compared with its cost?

Ans. I should say that one-third of the grade had wasted and washed away.

Q. State what that character of stone-work was worth at the time of its construction.

Objected to by def'ts' counsel as incompetent and irrelevant.

Ans. It was worth for abutments or second-class work about eight dollars per yard, and for culverts or second-class work five dollars per yard. I have seen the abutments near Judge Owens', near Clinton, and the piers at Grand river, and, to the best of my knowledge, they were all right when this company took charge of the road.

Q. State, if you know, how much grading the Kansas City and Southern Company had to do when they commenced laying their track.

Ans. I can't say how much they had to do; some all the way along. It was a narrow road-bed, prepared for a narrow-gauge road. The Kansas City & Southern made no change in the stone-work, to my knowledge.

Cross-examined by JOHN O'GRADY, Esq., solicitor & attorney for defendants:

Q. You state in your examination-in-chief that about one-third of the tract constructed by you washed away. Now, state how much cheaper that grade could have been constructed five years

440 ago than it was when you built it.

Ans. I say it could be done about ten cents less per yard—between a quarter and third less—and the stone-work in the same proportion.

Q. State if you know whether the right of way had ever been procured over that road you constructed.

Ans. All I know is that I had no trouble. I don't know of my own knowledge.

J. B. COLT.

Subscribed and sworn to before me on the day, at the place, and within the hours first aforesaid.

WALTER E. OWEN,
Notary Public.

STATE OF MISSOURI, } ss:
County of Henry, }

I, Walter E. Owen, a notary public for Henry county, Missouri, do certify that in pursuance of the annexed notice came before me, at the law office of Gannt & Casey, in the town of Clinton, in the county and State last aforesaid, J. B. Colt, who was by me sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined and his examination was reduced to writing and subscribed by him in my presence on the day, between the hours, and at the place in that behalf first aforesaid, and his said deposition is now herewith returned.

Given at city of Clinton, in the county of Henry, State of Missouri, this 27th day of November, 1888.

[SEAL.] WALTER E. OWEN,
Notary Public, Henry Co., Mo.

441 *Notice to Take Depositions in U. S. Courts.*

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

BERTHOLD SCHLESINGER *et al.*, Complainants,
against
KANSAS CITY AND SOUTHERN RAILWAY COMPANY *et al.*

You, the above-named defendants, of John O'Grady and C. O. Tichenor, your attorneys of record, are hereby notified that on Saturday, the 17th day of November, 1888, the above-named complainants will, in the above-entitled suit, at the law office of Pratt, McCrary, Ferry & Hagerman, room 18, Thayer building, in the city of Kansas, in the county of Jackson, in the State of Missouri, take depositions of Benjamin McLean and Thomas K. Hanna, to be used as evidence on the trial of said suit and on the hearing of each and every motion and application therein, and that the taking of said depositions will be commenced at nine o'clock a. m. of said day, and that the taking of the same will be adjourned and continued

from day to day, Sundays excepted, at the same place until the taking of the same is completed.

Dated this twelfth day of November, A. D. 1888.

J. BRUMBACK & GEO. W. McCRARY,
Attorneys for Complainants.

Service of the above notice is hereby accepted, and issue of dedimus, filing of interrogatories, and all exceptions as to time are hereby waived this 12 day of November, 1888.

C. O. TICHENOR,
Attorney for Defendants.

442 In the Circuit Court of the United States within and for the Western District of Missouri, Western Division, at Kansas City.

BERTHOLD SCHLESINGER *et al.*, Complainants,
v.
KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

Depositions of witnesses produced, sworn, and examined on the 17th day of November, A. D. 1888, between the hours of nine o'clock in the forenoon and six o'clock in the afternoon of that day, at the law office of Pratt, McCrary, Ferry & Hagerman, room 18, Thayer building, in the city of Kansas, in the county of Jackson, in the State of Missouri, before me, F. P. Barnett, a notary public within and for said county and State, in a certain cause now depending in the circuit court of the United States within and for the western district of Missouri, western division, between Berthold Schlesinger *et al.*, complainants, and The Kansas City & Southern Railway Company *et al.*, defendants, on the part of complainants.

THOMAS K. HANNA, of lawful age, being produced, sworn, and examined on the part of the complainants, deposeth and saith:

1. Please state your name and place of residence.

A. Thomas K. Hanna, Kansas City, Missouri.

2. How long have you lived in Kansas City?

A. About twenty years.

443 3. Are you one of the three trustees in whom the title to the property of the Kansas City, Memphis & Mobile Railroad Company was at one time vested?

A. I am.

4. To whom did the trustees sell and convey such property?

A. To James I. Brooks.

5. Have you in your possession a copy of the deed made by the trustees to said Brooks? If so, you will please hand it to the notary to be marked "Exhibit A" and made a part of your deposition.

A. I presume this is a copy; that is my recollection of it, that that is a copy.

The paper referred to by the witness is here offered in evidence and marked "Exhibit A."

6. It appears from the said deed that Brooks was to have until January 1, 1881, in which to build the road to Harrisonville or Belton, and until January 1, 1881, to build to the coal fields of Bates county. Please state whether prior to January 1, 1881, a contract concerning the property was entered into between said trustees and the Kansas City & Southern Railway Company; and, if so, whether said contract was in writing.

A. There was a contract entered into to extend the time of the completion of this work, or that part of the work specified in the deed to Brooks, and it was in writing.

7. If you have a copy of that contract please hand it to the notary to be marked "Exhibit B" as a part of your deposition.

A. This is a copy of the contract as I recollect it.

The paper referred to by the witness is here offered in evidence and marked "Exhibit B."

444 8. For whom were the three trustees of whom you were one acting?

A. They were acting for a company of gentlemen who purchased the franchises, rights of way, &c., of the original Kansas City, Memphis & Mobile railroad.

9. Do you know anything about a preliminary contract which some of those gentlemen had entered into with Brooks concerning the sale to him of the railroad property aforesaid?

A. I have no recollection of such contract; don't think I ever saw such a one.

10. Look at the paper which I now show you, dated November 1st, 1879, and state whether or not you have any recollection of ever seeing the original of that paper before.

A. I have no recollection of ever seeing it; don't think I ever did see it.

The paper here shown the witness is identified as "Exhibit C."

11. State whether the parties whose names appear to that paper were some of the parties for whom you acted as trustees.

A. Yes, sir; they are.

12. State whether the parties for whom you acted as trustee all knew about and acquiesced in the sale made to Brooks as evidenced by the deed executed by you as trustees, "Exhibit A" to this your deposition.

A. Yes, sir; it was presented to all of them and their acknowledgment taken to it. My recollection is that they all signed it.

13. State whether or not the terms of the final contract between the trustees and Brooks for the sale of said railroad property were all set forth in the deed to said Brooks, "Exhibit A" to your deposition.

A. I think they were, sir.

445 14. State whether or not the road was ever surrendered by the construction company under the terms of the preliminary agreement, copy of which is marked "Exhibit C."

A. It was not, as I recollect it. I have no recollection of any such surrender.

15. State whether or not the trustees ever accepted any such surrender from the construction company; and, if so, state when and how.

A. I have no recollection of ever accepting such surrender.

16. State when you became trustees. Was it at the time of the sale under the bankruptcy proceedings?

A. No, sir; Mr. Bancroft bought in the property at the sale and the company was made up within a very few days afterwards, and Mr. Bancroft deeded it to the trustees for these subscribers as we called them.

17. Your appointment as trustees was either at or before the date of the deed from Bancroft to you as trustees, was it?

A. It was about the same time. Of course, we were appointed trustees before the deed was made. The deed was made after we became trustees.

Cross-examination.

By Mr. TICHENOR:

18. You and the other trustees made a conveyance of this railroad property to a man by the name of Brooks?

A. Yes, sir.

19. Did Brooks comply with the agreement on his part as contained in his contract?

A. He paid the money—the purchase-money for the road.

446 There was a forfeiture clause in his contract which he did not comply with.

20. He did not comply with that?

A. No, sir.

21. Do you remember whether his interest was ever conveyed by him to the construction company?

A. Well, I have no knowledge of that.

21. To the Kansas City & Southern Construction Company?

A. He might have done so; there were other parties besides Brooks figuring on it.

22. Did you ever execute any other paper in reference to this property as trustees along with the other trustees to any one except Brooks?

A. We extended the time of the completion of the road. By Brooks' contract the road was to be done to a certain point by the first of January, 1881, and in December, 1880, was then made an extension of that time. It was the Kansas City & Southern. I thought it was the Kansas City & Southern Railroad Co. It might have been the construction company. It was somebody that was building the road. I might recollect it definitely if I saw the paper.

By Judge McCRARY: The paper shows that it was the railroad company.

WITNESS: Yes; that is my recollection of it.

By Mr. TICHENOR:

23. Well, you know this, that if there was any transfer by Brooks to the construction company the construction company never built the road, never completed it according to the terms of the contract with Brooks?

447 A. I know that the road was not completed within the time specified in the contract with Brooks.

Q. Well, did Brooks ever complete it—that is, Brooks himself?

A. Not to my knowledge.

25. Well, your information is that he did not do it?

A. Yes, sir.

26. You and your cotrustees made a deed, did you not, to the Kansas City & Southern Railway Co. when you had already——

A. The road was about to be forfeited by Brooks. In our deed to Brooks we reserved the right of forfeiture if certain things were not done. That forfeiture was about to expire, and an extension of time was asked, I presume, by the assigns of Brooks.

27. Well, you understood that that deed was made to the Kansas City & Southern Railway Company because Brooks, of the construction company, had not carried out their contract and the Kansas City & Southern Railway Company were proposing to carry it out?

A. As I said, the contract was not carried out by Brooks, and these people claiming under Brooks asked for an extension.

28. Wasn't it something more than an extension?

A. I think nothing more than an extension of time, as I recollect it.

29. Well, let's see. Wasn't it altogether a new contract you made?

A. No; I think not.

Q. In this contract of December 15th, 1880, it seems, as I read it, Mr. Hanna, that you made a new contract with the Kansas City & Southern Railway Company as follows: "1. The conditions provided and expressed in said deed of said trustees to said

448 James I. Brooks are hereby annulled, rescinded, and extinguished, and the said Kansas City & Southern Railway Company are hereby released and forever discharged from the performance of the same or any part thereof."

A. What is that?

31. That is the contract of December 15th.

A. Let me find that and read it to you. (Here witness reads from "Exhibit B" the language read by Mr. Tichenor in interrogatory 30 above.) Mr. Brooks had paid for the road——

32. But he had not lived up to the terms of his contract?

A. But he had not built the road, which was part of the contract.

33. As agreed to? Then did you make this new arrangement with the Kansas City & Southern road on account of that fact?

A. I didn't so understand it. Mr. Brooks owned the road. He

had a quitclaim deed to the road, but he had agreed that if he did not build a certain road within a certain time it should be forfeited. Now, the terms of forfeiture were all changed by this new deed.

34. Now, it was on account of those terms of forfeiture that this new contract was drawn up?

A. It was an extension of time to build the road, and new arrangements entered into with regard to forfeiture.

35. And it was on account of these terms of forfeiture in that original contract with Brooks that you made this new contract with the Kansas City & Southern Railway Company, wasn't it?

A. I should think so.

36. Then you did make a new contract?

A. He had not lived up to his first contract and these people asked an extension, and we were unwilling to grant the extension unless it was on certain conditions.

449 37. And there was something more. There was a new contract entered into, wasn't there, this contract of December 15, 1880, and new terms of forfeiture were put in?

A. Different terms; why certainly.

38. Of course. Then there was another contract entered into?

A. One was that he should forfeit the road and franchises and the other was to pay so much money if they didn't do it this time; they were to forfeit the money instead of the franchises.

39. And this new contract of December 15, 1880, was made with the Kansas City & Southern Railway Company, was it not?

A. Yes, sir; it was made with the Kansas City & Southern Railway Company.

40. And the reason why you made this new contract was because the terms of that contract between Brooks and yourselves, as trustees, had not been complied with? That was the cause of it, wasn't it?

A. The time for the forfeiture of our contract with Brooks had not expired. It was approaching the time for its expiration, and these people, being the assigns under Brooks, asked us to give them an extension of time to complete the road.

41. Well, it was generally thought at that time, wasn't it, and the general opinion of you all, that they could not comply with the terms of that original contract—that is, the Brooks contract—and you knew it would have to be forfeited according to terms of that contract and there had to be a new contract made?

A. Oh, certainly; he couldn't fulfill his contract so far as completing the road was concerned.

42. This contract of the 15th of December, 1880, contains this language: "The conditions provided and expressed in said

450 deed of said trustees to said James I. Brooks are hereby annulled and extinguished." Well, that was part of the understanding, wasn't it?

A. Of course it was part of the original understanding that he was to forfeit the road if he did not build the road; but by the new contract there was no forfeiture of franchises or rights of way, but in lieu thereof he was to forfeit money.

43. But this contract was not made with Brooks at all.

A. By "he" I mean the assigns of Brooks.

44. The Kansas City & Southern Railway Company. Well, who deposited this $25,000 mentioned in this contract of December, 1880?

A. I can't say who deposited it.

45. Wasn't it the Kansas City & Southern Railway Company?

A. I presume so. I thought that they were the parties entering into the contract, or some representative of theirs.

Redirect examination.

By Mr. McCRARY:

46. You speak of the paper marked Exhibit B as a deed. Was it a deed or a contract?

A. I can't say that it was a deed. It didn't convey anything; only extended the time with regard to a forfeiture. Not being versed in legal phraseology, I should call it a contract; it might be a deed.

47. Well, it speaks for itself, does it not?

A. Yes, sir.

48. How much did the time for the completion of the road as per contract or deed to Brooks lack of having expired at the time that contract was made?

451 A. The two papers will show that.

49. At whose request was "Exhibit B" executed by the trustees?

A. At the request ot the owners of the franchise and road-bed.

50. By that do you mean the parties to whom Brooks had assigned?

A. Yes, sir.

51. Was Brooks present at that transaction, taking any part in it?

A. I think not; I have no recollection of it.

52. Did the trustees ever make any other contract or contracts respecting that property except those that are expressed in the deed to Brooks, "Exhibit A," and the contract with the Kansas City & Southern Railway Company, "Exhibit B" to your deposition?

A. I have no recollection of such.

THOMAS K. HANNA.

Subscribed and sworn to before me by Thomas K. Hanna this 20th day of November, 1888.

[SEAL.] F. P. BARNETT,
Notary Public, Jackson Co., Mo.

Owing to the absence of the witness, Benjamin McLean, the taking of these depositions is now continued to Monday, November 19th, 1888, then to be resumed at the same place and between the same hours.

F. P. BARNETT, *Not. Pub.*

452 Now, on this 19th day of November, 1888, upon request of counsel for defendants and by consent of both parties, the further taking of these depositions is continued until Saturday, the 24th day of November, 1888, then to be resumed at the same place and between the same hours.

F. P. BARNETT, *Not. Pub.*

Now, on this 24th day of November, 1888, at the place in the caption hereto named and between the hours of nine o'clock in the forenoon and six o'clock in the afternoon of this day, pursuant to the foregoing adjournment, the taking of these depositions is resumed as follows:

BENJAMIN MCLEAN, of lawful age, being produced, sworn, and examined on the part of the complainants, deposeth and saith:

Direct examination by Mr. MCCRARY:

53. Please state your name and place of residence.

A. Benjamin McLean; 1028 Penn St., Kansas City, Missouri.

54. How long have you lived in Kansas City?

A. Nearly twenty-three years.

55. Were you one of the trustees in whom the title to the property of the Kansas City, Memphis & Mobile Railroad Company was one time vested?

A. Yes, sir.

56. Who were the other trustees?

A. John D. Bancroft and Thomas K. Hanna.

57. To whom did the said trustees sell and convey said railroad property?

A. To James I. Brooks.

453 58. For what consideration?

A. It was nineteen thousand dollars and something. It is expressed in the deed.

59. Was the consideration paid by Brooks?

A. Yes, sir.

60. How?

A. In money.

61. Was a deed executed to Brooks by the trustees?

A. Yes, sir.

62. Please look at the paper now shown you, which is "Exhibit A" to the deposition of Thomas K. Hanna in this case, and state whether according to your recollection that is a deed made by the trustees to Brooks.

A. Yes, sir; that, I should think, was a copy.

63. It appears from said deed that Brooks was to have until January 1st, 1881, in which to build the road to Harrisonville or Belton and until July 1st, 1881, to build the road to the coal-fields of Bates county. Please state whether prior to January 1, 1881, a contract concerning the property was entered into between said trustees and the Kansas City & Southern Railway Company; and, if so, whether the contract was in writing.

A. There was, and it was in writing.

64. Please look at the paper now shown you and which — "Exhibit B" to the deposition of Thomas K. Hanna and state whether that, according to your recollection, is a copy of the contract last referred to.

A. Yes, sir.

65. Do you know anything about a preliminary contract which was made by certain parties with Mr. Brooks respecting the sale of said railroad property to him?

454 A. I had no knowledge of that until here recently, and that I have only by hearsay.

66. Please look at the paper now shown you and which is marked "Exhibit C" to the deposition of Thomas K. Hanna, and state whether the parties whose names appear signed to that paper were some of the parties for whom you acted as trustees.

A. They were.

67. Have you any recollection of seeing that paper at the time or about the time you sold to Brooks?

A. I never saw the original papers, but this copy I have seen recently—very recently.

68. State for whom the three trustees acted in the purchase and sale of said railroad property.

A. I don't know as I can give them without reference——

69. I don't care for the names, just state generally.

A. It was a party of gentlemen who got together to purchase that property with the intention of holding it and selling it again to some party in whom we had confidence would build the railroad, expecting to sell it at cost and interest.

70. State whether or — all the parties for whom you acted were aware of your sale to Brooks and consented thereto.

A. They were and did.

71. State whether or not the terms of the final contract between the trustees and Brooks for the sale of said railroad property were all set forth in the deed to Brooks, "Exhibit A" aforesaid.

A. They were.

72. State whether or — the road and property conveyed to Brooks was ever surrendered by the construction company under

455 the terms of the preliminary agreement, copy of which is marked "Exhibit C" to the deposition of Mr. Hanna, and which has been shown to you.

A. Surrendered by us?

73. No; surrendered by Brooks or the construction company.

A. Well, I have no knowledge of that.

74. State whether or not the trustees ever accepted any such surrender from the construction company; and, if so, when and how.

A. No, sir; we never did and never intended to, to my knowledge.

75. State when you became trustees. What was the time with respect to the date of the deed from Brancroft to you as trustees?

A. Well, I have forgotten, but I suppose those dates will show.

76. They will show when you got the title, but they don't show when you were appointed trustees.

A. It was a few days before the date of the deed. There was a party made up to buy the property, but Mr. Bancroft bought it in his own name and deeded it to us as soon as he could thereafter,

77. You were appointed trustees, then, I suppose, a few days before the date of the deed to you?

A. Yes, sir; we held a meeting and in that meeting the trustees were appointed. There couldn't have been over a day or two intervening.

78. At the time you made the contract with the Kansas City and Southern, whereby the time for constructing the road as provided in the deed to Brooks was extended and the conditions were changed, was Mr. Brooks present, taking part in the negotiations?

456 A. I think he was, but I am not sure. It is so long since that I am not positive. I think he was, though.

79. Had the Kansas City & Southern at that time, as you understood, become the purchaser of the railroad property from Brooks or from the construction company?

A. As I understood, they had become the purchasers from Brooks. I didn't know anything about the construction company.

80. Had the Kansas City & Southern Railway Company undertaken to carry out the terms of the deed to Brooks, as you understood, at the time?

A. Yes; I understood they had so undertaken, but what they had done I did not know.

81. At whose request was the time extended for the construction of that road and the conditions changed, as set forth in the contract between the trustees and the said Kansas City and Southern Railway Company?

A. Well, I couldn't tell you. I am not sure who they were acting for. I could merely say what we understood about the extension upon those conditions.

82. Well, please state your recollection of the transaction.

A. Well, they wanted further time and we agreed to extend the time for carrying out of those conditions by their putting up $25,000 forfeit. That was all, I think.

83. Were the terms of your agreement, as you understood them, pretty fully set forth in your contract with the Kansas City & Southern Railway Company?

A. Yes, sir; we thought so. I think they were drawn up by Judge Black. I know the original deed was.

Counsel for defendant- not having appeared to cross-examine, counsel for plaintiffs consent that the taking of this deposition may be kept open until defendant- shall have had an opportunity to

457 cross-examine, if desired.

Now, on this 26th day of November, 1888, the taking of these depositions is by consent of both parties resumed for the purpose of allowing defendants to cross-examine witness McLean.

Cross-examination by Mr. O'GRADY:

Q. I hand you herewith the deposition of Mr. Hanna. Are the facts stated therein about as you understand them?

A. Yes, sir; about as I understand them.

Q. Now, Mr. McLean, there were certain conditions in the first deed to Brooks, were there not? I mean the deed marked Exhibit A to this deposition. Were those conditions ever complied with?

A. The time of the completion of the construction was not carried out. At least they came and wanted further time. Of course, I did not see what was done on the road.

Q. Did Brooks ever expend the sum of fifty thousand dollars upon the Kansas City & Southern railway provided for in Exhibit A?

A. I don't know.

Q. Now, this provision is in the deed to Brooks, marked Exhibit A to this deposition: "Provided, however, that as soon as said second party shall expend the sum of fifty thousand dollars in the construction of a road-bed," &c. Now, how much of that fifty thousand dollars was expended, do you know, in the construction of a road-bed by Brooks?

A. No, sir; I do not know.

Q. Do you know as a matter of fact that Brooks never expended any money at all in the construction of the road-bed?

458 A. No, sir; as a matter of fact I do not know anything about Brooks nor the Kansas City & Southern Railroad Company's business nor how much they expended upon this construction.

Q. Now, did the Kansas City & Southern Construction Company ever expend $50,000 or any part of $50,000 in the construction of that road-bed?

A. I don't know that either. We were governed by the conditions of the extension of time for construction. We were governed by the engineer's certificate when we surrendered the $25,000, and on his certificate we had to surrender. They brought forward that certificate. I believe it was the Kansas City & Southern.

Q. Now, did the officers of the Kansas City & Southern Construction Co. notify you that they would be unable to comply with the provisions of the deed to Brooks?

A. Somebody did, but I don't know. I think it was Brooks.

Q. Then prior to the making of the deed to the Kansas City & Southern Railway Company, which is marked Exhibit B to this deposition, you were notified that neither Brooks nor the construction company, who claimed under Brooks, could comply with the conditions of the deed marked Exhibit A to this deposition?

A. I was so informed by them that they could not employ with it.

Q. Now, when you say "them" who do you refer to?

A. Well, I could not say definitely, because there was Brooks and the engineer, and Mr. Martin was treasurer. He acted in all the companies. It was with Mr. Martin that I generally talked—

Mr. E. L. Martin. It was with him that I generally had my conversation.

Q. Now, when you made the deed marked Exhibit B to this deposition to the Kansas City & Southern Railway Com-
459 pany, at whose solicitation did you make it?

A. I could not tell you definitely. I had not thought anything about it, in fact, up to the present time.

Q. Between the time that you were notified that Brooks and the Kansas City & Southern Construction Company, who claimed under Brooks, and the time you made the deed marked Exhibit B to this deposition to the Kansas City & Southern Railway Company, had there not been a surrender by the construction company to the trustees because the construction company had not complied with the conditions of the deed which was made by the trustees to Brooks, and which is marked Exhibit A to this deposition?

A. There was no surrender of any road. They merely came to us and asked for an extension of time, and we granted it upon their putting up a forfeit.

Q. Now, do you remember all the conversations that transpired between you and the officers of the construction company at that time?

A. No; I do not. In fact I don't remember a word of any of it. I don't know as I could recall a word of it, because I never thought about it. I might if I had something to refresh my memory.

Q. Now, if there had been a surrender you have no recollection of it at the present time?

A. No; there was no surrender. I do remember that.

Q. Well, if you cannot remember the conversations, how do you know that there was no surrender?

A. Well, could a surrender be verbal?

Q. Yes; a surrender could be verbal.

A. I do not know of a verbal surrender, or anything tending to a surrender. I think if there had been I would have known of the surrender.

460 Q. Now, you say you remember scarcely a word of the conversation. How many conversations did you have with reference to the construction company being able to comply?

A. I do not think we had any at all. They came and asked for an extension. I do not remember seeing them at all. They came and made the request and we referred them to Judge Black, our lawyer—I think it was Judge Black—and he drew up the papers and we signed them, and they put up the money, $25,000, in the hands of Mr. Hanna, who was acting for us three trustees, I think; I did not pay much attention to it.

Q. There was a new contract entered into then between the trustees and the railway company?

A. There was an extension of time, if you call that a new contract; but nothing further.

Q. Do I understand you to say that there was no separate and distinct contract between the trustees and the Kansas City & South-

ern Railway Company from that made to Brooks for the extension at the time they paid the $25,000?

A. There was no contract only what is here in writing made between us.

Q. Did not the contract in writing provide for additional guarantees by the railroad company and for the additional expenditure of money by that company to those in the deed to Brooks?

A. No, sir; the deed from us to Brooks was for a forfeiture of the road back to us; but we did not want that. We wanted it built. We did not buy it to speculate on, and I know at the time we were a little afraid of the statute of limitations running against the right of way, and we accepted the money forfeiture and they put it up just as it reads there.

461 Q. Now, do you remember any conversation you had with Mr. Brooks in reference to his inability or the inability of the construction company to comply with the provisions of the deed to Brooks, or any part of it?

A. No; I do not remember any part of it. It was so long since, I have forgotten all about it. I have had no occasion to think of it, for it was not my own business. I was not attending to it.

Q. Do you recollect any part of the conversation you had with Mr. Martin?

A. No, sir; I do not.

Q. Was there any reference to the ability of the construction company to comply with the provisions of the deed made to Brooks marked Exhibit A to this deposition?

A. If I remember right, we had very little conversation about that. They merely asked for an extension of time, and we told them that if they would put up a forfeiture of money we would extend it, and they did so. We referred them to, I think, Judge Black, who drew up the extension. I think it was Judge Black. I know he drew up some of the papers. I know that we felt that it was a city transaction and that he would make no charge for his work.

Q. Now, how did you come to make the deed to the Kansas City & Southern Railroad Company marked Exhibit B to this deposition?

A. I don't know as we ever made a deed.

Q. Well, you made a contract or a paper purporting to be a deed.

A. No; I do not so understand it.

Q. Extending the time of doing the work in the other deed; that is the deed to Brooks. In the first place in this deed it is

462 provided that "the conditions provided and expressed in said deed of said trustees to said Brooks are hereby annulled, rescinded, and extinguished, and the said Kansas City & Southern Railway Company are hereby released and forever discharged from the performance of 'the contract.'" Now, at whose solicitation did you make the paper of which this extract here is a part?

A. Well, as I said before, it was Brooks or the engineer; but which one I cannot tell.

Q. Did the three trustees act together?

A. I do not think Mr Bancroft was here. He might have been.

Q. Then you all acted together?

A. Well, we must have acted together then. I arranged the sale to Brooks originally. I was the only one here. Mr. Hanna was at St. Joe and Mr. Bancroft was at Chicago.

Q. Did you know a gentleman called J. E. Young at that time?

A. There was a Mr. Young, but I do not know his initials. There was a man called Young around about that time.

Q. Now, was not the Mr. Young who dealt with you acting as the representative of the Kansas City & Southern Railway Company, and did he not induce you to make this deed or paper marked "Exhibit B" to this deposition?

A. Well, I could not say. It is too indefinite for me to say anything about it. I cannot remember.

Q. Now, did not Mr. J. E. Young, prior to the making of the paper marked Exhibit B to this deposition, state to you that the Kansas City & Southern Construction Company had forfeited its rights under the Brooks deed and had not the necessary means to go on, but that the Kansas City & Southern Railway Company would build the road, and that he wanted an express and
463 distinct agreement from the trustees in relation to building the same?

A. I do not think he did, for if he did he would have gotten it, and we did not give it; but I cannot remember, as I say, a word of the conversation that passed between us; but I do know that he did not get it.

Q. With whom were the negotiations made on behalf of the railway company—I say railway company—prior to the making of the paper marked Exhibit B to these depositions?

A. I cannot remember.

Q. Were they not made with J. E. Young, who was then representing the Kansas City & Southern Railway Company?

A. They might have been; but still I do not think they were. As I said before, I can't remember distinctly. I do not think they were. I think Brooks was around. I knew Brooks well, and naturally talked with him.

Q. Then you say that the paper marked Exhibit B was made at Brooks' solicitation?

A. No; I do not. I think I have told you times enough that I do not remember.

Q. Well, then, I understand you to say that you never, acting as trustees, had any dealings with J. E. Young, representing the Kansas City & Southern Railway Company, prior to the making of this paper marked Exhibit B?

A. When did I say that? You say that you understand me to say——

Q. Yes, sir; I undertsood you to say that.

A. I did not say it.

Q. Well, what did you say?

464 A. I said I could not remember.

Q. Now, you cannot remember distinctly whether any-

thing was said about the surrender of the road by the construction company?

A. I never heard it mentioned that the road would be surrendered by any one.

Q. Now, you say that you do not remember any part of the conversation scarcely; that you do not remember a word of it?

A. I could not tell what was said exactly. I think Mr. Martin came and told what they wanted. In fact there was not a great deal of talk. They just told what they wanted us to do and we did it and there was nothing to talk about.

Q. Do you not know, as a matter of fact, and was it not communicated to all of the officers of the construction company here that the construction company could not comply with the conditions in the Brooks deed.

A. Well, it was intimated that they had not complied and wanted further time, and that is the reason we granted further time to the Kansas City & Southern R'y Co.

Q. That is not in answer to my question. Don't you know, as a matter of fact—was it not brought to your personal knowledge that the Kansas City & Southern Construction Co. could not comply with the terms embodied in the deed to Brooks by you as trustees?

A. I did not know what they could do. If I knew the difference in time between the end of the forfeiture and the extension to the Kansas City & Southern R'y Co. I would be governed by that as to any opinion whether they would have time to do it or not. If the time of the forfeiture was nearly up in the first original deed to Brooks, then they could not do it, and that I don't know. I cannot tell the difference in time.

465 Q. Well, were you not notified by Brooks that the construction company could not carry out the provisions of the Brooks deed?

A. I don't know. They might have said something and we might have inferred it. They might have said that they could not do it; I know some one came and wanted further time.

Q. Did the construction company ever ask for further time?

A. Somebody asked for an extension. I think it was Mr. Martin, who was acting as treasurer for some company, and I think he was treasurer of the Kansas City & Southern Railway Company.

Q. Do you mean to tell me that E. L. Martin was ever treasurer of the construction Co.?

A. I think he was treasurer of some company. When we had negotiations with them I know he came to me.

Q. Now, don't you know, as a matter of fact?

A. I know he was holding office at the time we surrendered the $25,000. He came for it himself, and I told him that I did not think they had built the road in good faith and I did not surrender the money, and we got into a dispute about it. We did not pay the money at that time, but approved it afterwards.

Q. Well, what knowledge did you have at that time, I mean prior to the time of the making of the paper marked Exhibit B to this

deposition, that the Kansas City & Southern Construction Company could not comply with the conditions in the Brooks deed?

A. I had no knowledge any more than their asking for an extension in the name of the other company.

Q. Do you mean to tell me that the Kansas City and Southern Construction Company never asked for an extension of the terms of the Brooks deed?

A. I could not tell who asked. They were so mixed up I
466 did not know which was which; I did not know one from the other; I could not tell who asked. They were the same individuals representing both companies.

Q. Well, was Mr. Young—Mr. J. E. Young—an officer of the construction company?

A. I don't know.

Q. Don't you know, as a matter of fact, that he represented the railway company at the time of making the paper marked Exhibit B to this deposition?

A. I think there was a man of that name; I know there was; but who he represented, and whether it was the construction company or the Kansas City & Southern Railway Company, or both, I don't know. I think it was both.

Q. Don't you know that he stated to the trustees, prior to the making of the paper marked Exhibit B, that as the Kansas City & Southern Construction Company was unable to comply with the terms in the Brooks deed and surrendered the property he would like to make a new contract on behalf of the railway company with the trustees for the construction of that road?

A. You ask if Mr. Brooks said so, or rather did Mr. Young say so?

Q. Yes, sir; did Mr. Young say so?

A. As I said before, I cannot remember the conversation.

Q. Now, can you remember any part of the conversation with any of the parties at that time?

A. No, sir; the detailed conversation I could not. I could merely state what they asked for and what we did.

Q. Can you give any part of the conversation that occurred prior to the making of the paper maked Exhibit B with any
467 of the parties?

Objected to on the ground that the contract is in writing and prior conversations are not admissible.

A. I do not think we had any.

Q. Now, when did it first come to your knowledge that the Kansas City & Southern Construction Company was unable to comply with the terms of the Brooks deed?

A. I do not think it ever came to my knowledge. They never told me that they were unable to comply with the terms of that deed. They just merely came and asked for an extension of time.

Q. Did any of the officers of the construction company ever ask for an extension of time?

A. They certainly did, or else they would not have gotten it.

Q. When did you give the extension of time of the conditions of

the Brooks deed to the Kansas City & Southern Construction Company?

A. We gave them Exhibit B there. That was the only thing we ever gave.

Q. The paper marked Exhibit B to this deposition was not given to the construction company; it was given to the railway Co., was it not?

A. Well, it reads there.

Q. Now, in Exhibit B there was an entirely new contract entered into with the Kansas City & Southern Railway Co., was there not?

A. No; it was not a new contract.

468 Q. Now, you do not have that conversation you had with Mr. Young prior to the making of the paper marked Exhibit B to this deposition?

A. No, sir.

Q. You do not remember a word of it?

A. No; I don't know as I had any conversation with him.

Q. If you did have any conversation with him you don't remember a word of it?

A. I don't think I would have any conversation with him for the reason that I knew some of the other parties better. There was naturally but very little said. There was nothing that called for conversation. I don't know as we met together at all to sign the new deed. I was very busy at that time and could not devote any length of time to it.

Q. Do you know whether or not any person had authority to represent the Kansas City & Southern Railway Co. in Kansas City at and prior to the making of Exhibit B by J. E. Young?

A. No; I do not. I don't know anything about it.

Q. Do you know with whom you made the contract which is embodied in Exhibit B on behalf of the Kansas City & Southern Railway Company?

A. Well, I said I thought it was with Mr. Brooks. I think Mr. Martin was present, and Mr. Young may have been present. It was with some of those parties or with all of them. They were the same parties we had been dealing with.

Q. You don't remember negotiating particularly with Mr. Young?

A. No; I don't remember the details.

Q. You don't remember any part of the conversation that transpired prior to the making of the deed marked Exhibit B to this deposition with any of the parties?

A. We had no conversation, I am sure. Somebody asked
469 for an extension and we granted it, and, to the best of my remembrance, it was either Brooks or Martin or both, and I think Mr. Young was one; since you mention his name I think I can remember.

Q. Don't you know, as a matter of fact (in order to refresh your memory)—don't you know that Mr. Brooks was not in the city at that time nor long prior to that time?

A. No, sir; I do not. Mr. Brooks was here off and on. He was never permanently residing here.

Q. Now, if anything was said about surrendering the road prior to the making of the deed marked Exhibit B by Mr. Young to you, you don't remember it?

A. No; I know there was no surrender. There was no offer of surrender nor no thought of surrender that I ever heard of. While I do not remember the details, I remember enough to recall the acts done, and if anything was done I would remember it, because we are all interested in the completion of the road. We would all liked to have seen it completed.

Q. Now, give your idea or definition of surrender.

A. Well, if parties should make a deed or tell you that they could not carry out its conditions and would have to surrender the road and abandon it or give you a notice in writing to that effect.

Q. Well, now, were not the trustees told by Mr. Young and by Mr. Brooks that the construction Co. would be unable to comply with the conditions of the Brooks deed? Were they not told that?

A. I could not say as to that. As I told you before, I know they requested an extension of the time of those conditions.

Q. Did I understand you to say that either Mr. Brooks or Mr. Young told the trustees that the construction Co. would be unable to comply with the conditions of the Brooks deed?

470 A. They never told me; at least I have no recollection of any such thing.

Q. You have no recollection of it?

A. Well, no; I have not.

Q. They might have told you so and you not recollect it now.

A. I don't think they told me so. I don't think they would admit it. They wanted an extension of time, and that is all I know distinctly. We told them that if they would put up the money we would grant the extension, and they did so.

Q. Did you have any knowledge of a conveyance by the construction Co. to the railroad Co. prior to the making of the paper marked Exhibit B to this deposition?

A. I heard some talk about it, but I had no official information.

Q. You heard somebody talking about it? Now don't you know it as a matter of fact?

A. No; I don't know it as a matter of fact.

Q. Don't you know as a matter of fact that prior to that conveyance the construction Co. had gone out of business? Were not the trustees so notified?

A. No, sir; we never had any notice of anything of the kind. I don't see what they would want to notify us for.

Q. Now, according to the conditions of the Brooks deed, the "said party of the second part is to build said railroad from Kansas City to Harrisonville or Belton, as said second party may elect, on or before January 1, 1881, so as to be ready for use as a railroad, and also to build said railroad to the coal fields of Bates county to a point south of Butler on or before July 1st, 1881, so as to be ready for like use as aforesaid." Now, don't you know as a matter

471 of fact that prior to this deed of December 15, 1880, marked

Exhibit B, that no work was done at all on the line of that road by the construction Co.?

A. They claimed they were working at the other end.

Q. Did you ever see any work or did you know of your own personal knowledge of any being done?

A. I don't know of my own knowledge.

Q. According to the conditions in the Brooks deed the road was to be constructed from Harrisonville to Kansas City on or before the 1st day of January, 1881, was it not?

A. It so reads there; that is all I know—whatever it reads there. I suppose that to be correct.

Q. Well, on the 15th day of December, 1880, you made the paper marked Exhibit B?

A. Yes, sir.

Q. At that time you had perfect knowledge that the construction Co. could not carry out its contract, did you not?

A. No; there was quite a time there that intervened in which they might have done it.

Q. How much time intervened in which they might have done it?

A. You can see there.

Q. There was 15 days in which to complete a railroad of 40 miles, was there not?

A. I would not say. The papers show for themselves.

Q. These papers show 15 days in which to build 40 miles. The deed to Brooks stipulates that the railroad is to be built from Kansas City to Harrison- or Belton on or before January 1st, 1881, and the paper marked Exhibit B is executed on the 15th day of December, 1880.

472 A. Well, if they had to build to Harrisonville or Belton on or before January 1st, 1881, of course, there would not be time to do it in 15 days, and we must have so understood it—that they would not have time to do it.

Q. Then, when you made the paper marked Exhibit B, you, as one of the trustees, was perfectly aware that the construction Co. would be unable to comply with the conditions in the Brooks deed, were you not?

A. I think they claimed that they had some work done down there; that they had considerable of it done, but I judge they were not able to. Well, if they had been they would not have asked for an extension; that is apparent.

Q. You know, as a matter of fact, that they could not build the railroad from Kansas City to Harrisonville?

A. Yes; I knew that positively.

Q. Then you knew, as a matter of fact, that the construction Co. would be unable to comply with the provisions of the Brooks contract prior to the making of this paper marked Exhibit B?

A. Yes, sir; we knew that.

Q. Well, now, how long prior to that did you know that the construction company would be unable to comply?

A. I could not say. I am merely judging from the dates of the

instruments more than anything else. I see that it was impossible from the dates of the deeds.

Redirect examination by Judge McCRARY:

Q. I observe that in your cross-examination you do not distinguish very clearly between the construction Co. and the railway Co. Please state whether you knew then or know now who represented the one company and who represented the other.

A. Well, I don't definitely. The same parties had come to
473 me as representing both companies, and we did not inquire who they were or who they represented.

Q. Please state whether any conversation or negotiations you may have had with respect to the extension of time and the changing of the conditions expressed in the Brooks deed were reduced to writing and whether they are shown by the paper marked Exhibit B to the deposition of Mr. Hanna.

A. It is all shown in that.

Q. Were you aware at the time of these negotiations that the construction Co. had, as early as September 18, 1880, made a deed conveying the railroad property to the Kansas City & Southern Railway Co.?

A. No, sir; I was not.

Q. When you say in answer to cross-examination that the construction Co. had failed to comply with the terms of the deed and had not time to go on and comply with those conditions, do you mean to state that the construction Co. were bound to — on and build the road after having made the sale to the railroad company above mentioned?

Objected to as incompetent, irrelevant, immaterial, and leading.

A. Yes, sir; I think the construction Co. was bound to us long after the terms had expired to fulfill that contract. It was optional with us whether we would accept the forfeiture or not.

Q. Exhibit B provides as follows: "And whereas said last-named company (that is, the Kansas City & Southern Railway Company) has not been able to comply with and perform said conditions within the time specified in said first-named deed for their performance,
but is now willing to deposit and has deposited with said
474 trustees the sum of twenty-five thousand dollars as a guaranty by said last-named company of the good faith of its purpose to build a railroad southeasterly from Kansas City, Missouri," &c. Does that express the fact as you understood it at the time as you remember it now?

A. Yes, sir.

Q. Counsel has repeatedly referred to the paper marked Exhibit B as a deed. Do you understand that it was a deed?

A. No; it was merely an extension of the conditions in the deed to Brooks.

BENJAMIN McLEAN.

Subscribed and sworn to by Benjamin McLean this 5th day -f December, 1888.

F. P. BARNETT,
[SEAL.] *Notary Public, Jackson Co., Mo.*

475 STATE OF MISSOURI, } ss:
County of Jackson, }

I, F. P. Barnett, a notary public within and for the county of Jackson, in the State of Missouri, do certify that, in pursuance of the annexed notice, came before me at the law office of Pratt, McCrary, Ferry & Hagerman, room 18, Thayer building, in the city of Kansas, in said county and State, Thomas K. Hanna and Benjamin McLean, who were by me severally sworn to testify the trusth, the whole truth, and nothing but the truth of their knowledge touching the matter in controversy aforesaid; that they were examined and their examination reduced to writing and subscribed by them respectively in my presence on the days, between the hours, and at the place in that behalf aforesaid, and their said depositions are now herewith returned.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at my office, in the city of Kansas, Missouri, on this 5th day of December, 1888.

[SEAL.] F. P. BARNETT,
Notary Public, Jackson Co., Mo.

476 EXHIBIT A.

Whereas the Kansas City, Memphis & Mobile railroad, with all its road-bed, rights of way, appurtenances, and property and rights of property whatever connected with said railroad; with all the franchises of the Kansas City, Memphis & Mobile Railroad Company, were by deed dated April 27, 1877, and recorded in the recorder's office for Jackson county, Missouri, at Kansas City, April 30, 1877, in Book B 27, on pages 59, 60, 61, & 62 -hereof, conveyed to the undersigned Thomas K. Hanna, Benjamin McLean, and John D. Bancroft, as trustees;

And whereas owners of more than two-thirds of the moneys and shares furnished by the persons and firms named in said deed for the purchase of said property have directed said undersigned trustees, as provided in said deed, to sell said property to James I. Brooks, on the terms and conditions herein named, for the sum of nineteen thousand one hundred and fifty-six & $\frac{87}{100}$ dollars:

Now, therefore, know all men by these presents that we, the said trustees, parties of the first part, for and in consideration of said sum to us in hand paid by said James I. Brooks, party of the second part, the receipt of which is hereby acknowledged, have this day remised, released, conveyed, transferred, and forever *w*uitclaimed to said party of second part said railroad, rights of way, road-bed, appurtenances, property, rights of property, and franchises:

To have and to hold the same unto him, the said party of the

second part, and to his heirs and assigns forever, subject, however, to the following conditions:

477 Said party of the second part is to build said railroad from Kansas City to Harrisonville or Belton, as said second party may elect, on or before January 1, 1881, so as to be ready for use as a railroad, and also to build said railroad to the coal fields of Bates county to a point south of Butler, on or before July 1, 1881, so as to be ready for like use as aforesaid; and if said second party shall fail to build said railroad to said coal fields as aforesaid, then the property hereby sold as aforesaid shall revert to said first party and reinvest in them the same as they now hold the same; provided, however, that as soon as said second party shall expend the sum of fifty thousand dollars in the construction of a road-bed for said railroad, commencing at Kansas City and running southwardly, then the said provision shall become null and void and of no effect whatever, and upon said expenditure being made in the building of said railroad as aforesaid, by said second party, of said sum of fifty thousand dollars, then said trustees are to execute to said second party or his assigns an instrument in writing acknowledging the waiver and extinguishment of said forfeiture. In the event of a disagreement between the said trustees and said second party as to the expenditure in fact by said second party of said fifty thousand dollars, as aforesaid, as said second party may hereafter claim, *and* said trustees and said second party shall each select an arbitrator, and they, in case of disagreement between them, shall select a third arbitrator, and in the case either party refuses to select an arbitrator, then the arbitrator chosen by the other party shall select two additional arbitrators, and the arbitrators selected in any of the above-mentioned modes shall determine whether such expenditure has been made by said second party, and such determination of said arbitrators shall be binding on both

478 parties and may be enforced by judgment as provided by the laws of this State. Said first party covenants and warrants to and with said second party that they, the said trustees, have not in anywise encumbered the said property, and that the same is free from all encumbrances done or suffered by them.

Given under our hands and seals this 13th day of January, A. D. 1880.

THOMAS K. HANNA, [SEAL.]
BENJAMIN McLEAN, [SEAL.]
JOHN BANCROFT, *Trustees.* [SEAL.]

479 EXHIBIT B.

Whereas the Kansas City, Memphis and Mobile railroad with all its road-bed, rights of way and appurtenances and property and rights of property whatsoever connected with said railroad with all the franchises of the Kansas City, Memphis and Mobile Railroad Company were by deed dated January 13th A. D. 1880 sold and conveyed by the undersigned trustees to one James I. Brooks on certain conditions expressed and contained in said deed and whereas

the title to said property subject to the said conditions has by sundry mesne conveyances passed to and vested in and is now owned and held by the Kansas City and Southern Railway Company and whereas said last-named company has not been able to comply with and perform said conditions within the time specified in said first-named deed for their performance but is now willing to deposit and has deposited with said trustees the sum of twenty-five thousand dollars as a guaranty of the good faith of its purpose to build a railroad southeastwardly from Kansas City, Missouri through the coal-fields of Henry county Missouri and the iron-fields of St. Clair county Missouri, the receipt of which sum of twenty-five thousand dollars by said trustees is hereby acknowledged and whereas since the making of said deed to said James I. Brooks various sums of money have been expended for rights of way, for engineering and other necessary expenses connected with the enterprise of building said railroad in addition to the purchase price paid to said trustees on the execution of said first-named deed by them and whereas the owners of more than two-thirds of the money and shares furnished by the persons and firms named in the deed of said property to said trustees dated April 27th A. D. 1877
480 have directed the undersigned trustees to execute and deliver this instrument to said Kansas City and Southern Railway company,

Now therefore, in consideration of the premises and of the sum of one dollar to said trustees by said Kansas City & Southern Railway Company in hand paid the receipt whereof is hereby acknowledged it is agreed, stipulated and covenanted by and between said trustees for themselves and their said beneficiaries and said Kansas City and Southern Railway Company as follows:

I. The conditions provided and expressed in said deed of said trustees to said James I. Brooks are hereby annulled, rescinded and extinguished and the said Kansas City and Southern Railway Company are hereby released and forever discharged from the performances of the same or any part thereof and in lieu thereof the trustees or a majority of them shall as said railroad from Kansas City Missouri southeastwardly through the coal-fields of Henry county Missouri and the iron-fields of St. Clair county Missouri shall be constructed pay out said twenty-five thousand dollars on the estimates and orders made and given in the building of said railroad by the chief engineer of said Kansas City and Southern Railway Company and as soon as said twenty-five thousand dollars is so paid out and the additional sum of fifteen thousand dollars is expended by the said last-named company in the building of said railroad then said last-named company shall hold said property so conveyed free from any and all claims of whatsoever kind on the part of said trustees or their beneficiaries or any of them.

II. It is further provided and covenanted that if said last-named company shall not expend the full sum of twenty-five thousand dollars in the building of said railroad before July 1st A. D.
481 1881 then so much of said twenty-five thousand dollars so deposited as shall on the day last aforesaid be unexpended

shall be forfeited to and become the property of said trustees for the benefit of their beneficiaries.

III. It is further provided and covenanted that as soon as said twenty-five thousand dollars so deposited shall be paid out and as soon as the chief engineer of said last-named company shall make his certificate of the expenditure by said last-named company of said additional fifteen thousand dollars in the building of said railroad which sum of fifteen thousand dollars shall be expended before October 1st A. D. 1881, then said trustees shall — said last-named company an instrument of writing duly executed and acknowledged evidencing the full compliance with and performance of all the conditions herein contained by said last-named company and if the sum of forty thousand dollars as above provided be expended by said company before October 1st A. D. 1881, then said property shall revert to said trustees as by said deed to said Brooks is provided.

In testimony whereof the said trustees Thomas K. Hanna, Benjamin McLean and John D. Bancroft have hereunto set their hands and affixed the- seals this 15th day of December A. D. 1880.

THOMAS K. HANNA, [SEAL.]
BENJAMIN McLEAN, [SEAL.]
JOHN D. BANCROFT, [SEAL.]
Trustees.

482 STATE OF MISSOURI, } ss:
Jackson County, }

Be it remembered that Thomas K. Hanna, Benjamin McLean, and John D. Bancroft, who are personally known to the undersigned, a notary public within and for said county, to be the same persons whose names as trustees are signed to the foregoing instrument of writing as parties ther-to, this 15th day of December, A. D. 1880, personally appeared before me and acknowledged that they executed and delivered the same as the voluntary act and deed of the beneficiaries for the uses and purposes therein contained.

In witness whereof I have hereunto set my hand and affixed my notarial seal. Done at office, in Kansas City, Missouri, this 15th day of December, A D. 1880.

My term expires January 8th, 1883.

[SEAL.] JOHN H. REID,
Notary Public.

We, the undersigned, being more than two-thirds in amount of the purchasers of the road-bed, rights of way, masonry, and of the property formerly owned and belonging to the Kansas City, Memphis and Mobile Railroad Company, conveyed by John D. Bancroft to Thomas K. Hanna, Benjamin McLean, and John D. Bancroft, trustees, by deed dated April 27th, A. D. 1877, and duly recorded, and assignees of said purchasers, do hereby, in accordance with the provisions of said deed, order and direct our trustees, Thomas K. Hanna, Benjamin McLean, and John D. Bancroft, to execute, acknowledge, and deliver to the Kansas City and Southern Railway

Company the foregoing and annexed instrument of writing upon the deposit by said company with said trustees of the sum of twenty-five thousand dollars, as in said instrument is provided.

483 Witness our hands this 15th day of December, A. D. 1880.

$500 00	E. L. MAR–IN & CO.
500 00	WARRINER, GREGORY & CO.
300 00	WM. HOLMES.
300 00	JOHN C. GAGE.
500 00	TOOTLE, HANNA & CO.
500 00	HOWARD M. HOLDEN.
1,000 00	H. M. HOLDEN, *Assignee of Edward H. Allen.*
500	H. M. HOLDEN, *Assignee of C. E. Robinson.*
300	H. M. HOLDEN, *Assignee of D. M. Jarboe.*
1,000	H. M. HOLDEN, *Assignee of J. D. Bancroft.*
500	BENJ. McLEAN.
1,000 00	PLANKINGTON & ARMOURS.
1,000 00	SMITH & KEATING.
1,000 00	SLAVENS, MANSUR & CO.
1,000 00	BULLENE, MOORES & EMERY.
500	TRUMBULL, REYNOLLDS & ALLEN.
300	LOUIS HAMMERSLOUGH.

Filed for record and duly recorded in my office on this 16th day of Dec., A. D. 1880, — p. m.

C. D. LUCAS, *Recorder.*

484 EXHIBIT C.

KANSAS CITY, MO., *Nov.* 1, 1879.

We, the undersigned, owners of the Kansas City, Memphis & Mobile R. R., hereby agree to sell to James I. Brooks or his assigns our interest in the Kansas City, Memphis & Mobile R. R. upon the following terms, to wit:

One thousand dollars in cash, balance to be payable either in cash or acceptable notes upon the completion of a satisfactory investigation of title, said investigation to be made within twenty days from this date, the whole payment to amount to nineteen thousand one hundred and twenty-five dollars.

Said Brooks to give a guaranty to build the road from Kansas City to Belton or Harrisonville on or before October 1, 1880, and to build a line either from Belton or Harrisonville to the coal-fields in Bates county within eighteen months from this date.

We hereby agree to deliver a good and proper assignment of such road free of all incumbrances. In case the said Brooks or assigns fails to build the road as above, all payments thereon to be forfeited and said road to revert to us.

We give a full release upon such forfeiture, upon satisfactory evi-

dence that money has been secured to enable said Brooks or assigns to complete said road as agreed, to enable said Brooks or assigns to raise money upon the securities of such contemplated road, the said Brooks or assigns to have the right to vary the line of said road as may be desirable between Kansas City and the coal-field-; this contract to be of no effect unless signed by two-thirds of amount in ownership.

	E. L. MARTIN.	$500 00
	WM. HOLMES.	300 00
	J. W. WOOD.	1,000 00
485	GATES & KENDALL.	300 00
	WARREN, GREGORY & CO.	500 00
	TRUMBULL, REYNOLDS & ALLEN.	500 00
	LOUIS HAMMERSLOUGH.	300 00
	BULLENE, MOORES & EMERY.	1,000 00
	M. DIVELY.	500 00
	SMITH & KEATING.	1,000 00
	JAMES P. HOWENSTEIN, *Rec. First National Bank.*	
	A. M. ALLEN.	300
	THOMAS McNAMARA.	300 00
	SLAVENS & OBURN.	1,000 00

Indorsed: Exhibit No. 1 to deposition of Amos Tenney, Wm. M. Nelson, notary.

486 STATE OF ILLINOIS, } *ss:*
County of Cook, }

BERTHOLD SCHLESINGER *et al.*
vs.
THE KANSAS CITY & SOUTHERN CONSTRUCTION COMPANY *et al.*

Deposition of John D. Bancroft, a witness produced, sworn, and examined on the first day of April, in the year of our Lord one thousand eight hundred and eighty-nine, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at Chicago, in the county of Cook and State of Illinois, before me, A. L. Davison, a notary public in and for the county of Cook and State of Illinois, in a certain cause now pending in the circuit court of the United States for the western district of Missouri, western division, wherein Berthold Schlesinger *et al.* are plaintiffs and The Kansas City and Southern Construction Company *et al.* are defendants, on the part of defendants.

Defendants appeared by their counsel, Mr. O'Grady.

Complainants, appearing by their counsel, George W. McCreary, waived notice for the taking of this deposition, but objected to taking the same at this time, on the ground that the time for taking testomony had expired, and, without waiving this objection, will cross-examine the witness.

& Southern Construction Company ever spent any money on the line of the road or complied with any of the conditions in the deed from the trustees to Brooks dated January 13, 1880.

A. I had personally quite an interest in this road-bed—more than appeared in my name—and was there watching it, and from my own knowledge know that they had not done any work on the road excepting the surveying and nothing to amount to anywhere near come to the conditions of the deed.

Q. Now, state if, from your own knowledge, you know whether Brooks or the Kansas City Construction Company ever spent one dollar in the actual construction of that road under the condition of the deed of January 13th, 1880.

A. I believe that they only made a survey. The expense of the survey would not really come under the conditions of the deed, as the conditions said the money must be spent on the construction of the road-bed.

Q. Can you approximate how much that survey cost?

A. I had surveyed the road myself very carefully and had a profile made of it. It cost me a little over fourteen hundred dollars.

Q. You do not know, however, how much the Kansas City & Southern Construction Company spent on the survey they made at that time?

A. I do not.

Q. But you know the survey was all the work they ever did?

A. To the best of my knowledge, it was.

491 Q. What knowledge, if any, do you have of the forfeiture of the road under the conditions of the deed of January 13th, 1880, from the trustees to Brooks?

A. We had knowledge of the conditions of the deed and knowledge of the fact that no work had been done up to the 15th day of December, 1880. We knew it was impossible to build forty miles of road in fifteen days, and therefore at that time we considered the deed forfeited, and that Brooks and the construction company, neither of them, had any right, title, or interest therein or would have on the 1st day of January, 1881, being unable to acquire it in that time.

Cross-examination.

By Mr. McCREARY:

Q. What was the nature of your interest in the road-bed?

A. The road-bed was bid off by myself personally for about sixteen thousand dollars. I had raised subscriptions from prominent citizens in Kansas City to help me pay for that road-bed. I took the deed of the road-bed from the assignees in bankruptcy to myself individually and then transferred it to Benjamin McLane, Thomas K. Hanna, and J. D. Bancroft as trustees for the subscribers who furnished the money to pay for the road that I bid off.

Q. Were you interested in the Kansas City & Southern Construction Co.?

A. No, sir.

Q. Or in the Kansas City & Southern Railway Co.?

A. No, sir.

Q. You had nothing to do with keeping the books of the Kansas City & Southern Construction Co.?

A. No, sir.

492 Q. You do not know of your own knowledge how much they expended then in connection with building that road?

A. I do not think they built anything on the road-bed itself. What they had speculated on or anything outside I do not know. The deed that the trustees gave to Brooks and from him to the construction company said that the money should be spent on the construction of the road-bed.

Q. Will you point out that clause in the deed? (Deed shown to witness.)

A. The clause is this: Provided, however, that as soon as said second party shall expend the sum of fifty thousand dollars in the construction of a road-bed for said railroad, commencing at Kansas City and running southwardly, then the said provision shall become null and void and of no effect whatever.

Q. What do you mean by road-bed?

A. A road-bed is the culverts, grading, bridging, and anything that the rails and ties of a railroad rest on.

Q. How frequently were you over that line during the time when the Kansas City and Southern Construction Company were the owners of it?

A. I could not say at this late day.

Q. Can you swear that you ever went over it?

A. I never went over the whole line of the road in my life.

Q. Can you state that you ever examined it or any particular part of it so as to be sure that they had or had not done anything in the way of grading or making the road-bed?

A. I am very certain from information which we have that they had not done anything in the way of grading or improving the road-bed.

Q. Did you know about it, then, only from information derived from others?

493 A. Partially, and from something of my own knowledge that they did not do anything over that portion which I have seen.

Q. But you had not seen the whole of it?

A. I never have seen the whole of the road-bed, although I had it surveyed, etc

Q. Do you know that the Kansas City & Southern Construction Company contracted for iron with a view of completing that road?

A. Not from my own knowledge.

Q. What is the date of the deed from the Kansas City & Southern Company to the Kansas City & Southern Railway Company?

A. I cannot state of my own knowledge, but I think it was in September, 1880. (Paper shown to witness.) It is the 18th day of September, 1880.

Q. After the making of that deed the enterprise was in the hands of the Kansas City & Southern Railway Company, was it not?

A. I suppose it was.

Q. And that company had assumed the obligation to go on and complete it in accordance with terms of the deed to Brooks?

A. I do not know that they assumed the obligation. I know if they did not fulfill the obligation the deed to Brooks would be void, and therefore the deed to them.

Q. The recitals in the contract of the trustees with the Kansas City & Southern Construction Company dated December 15th, 1880, are according to the facts as you remember them, are they?

A. Yes, sir; I believe those are the exact facts.

Q. The intention was, then, to release the railway company from the performance of the original conditions in the deed to Brooks and substitute other conditions which they were to perform as set out in the agreement?

494 A. The intention was to have money put up in a bank which should be forfeited if this Kansas City & Southern Railway Company did not build the railroad before the 1st day of October, 1881. The intention of the trustees solely and entirely was to have a railway built to those coal fields. They did not buy this road-bed for the purpose of speculating, and never made any money on it. The- sold it for what it cost them with simple interest added thereto, their entire and sole object being to have a railroad built.

Q. The agreement between the trustees and the Kansas City & Southern Railway Company, which you have stated expressed the exact facts, contains this: "First, the conditions provided and expressed in said deed of said trustees to said James I. Brooks are hereby annulled and extinguished, and the said Kansas City & Southern Railway Company are hereby forever released and discharged from the performance of the same or any part thereof, and in lieu the following conditions are hereby provided," and then it goes on making other conditions. Now, I repeat the question, was it not the intention of the parties that the railway company should be released from the performance of the conditions in the deed to Brooks and the new conditions embodied in this agreement should stand in lieu of those original conditions?

A. The trustees intended by that contract to release the railroad company from building certain road before a certain time and to make them put up money as forfeiture if they did not build it before another certain time; that is what the trustees were after.

495 Q. Then the original conditions in the deed to Brooks were annulled and extinguished, were they not?

A. They were.

Q. And certain new conditions were embodied in the contract of December 15th, 1880?

A. That contract to the Kansas City & Southern Railway Company is virtually a new contract.

Q. It speaks for itself and states correctly what the contract was?

A. Yes, sir.

Q. You say that you considered the deed to Brooks as forfeited?

A. Yes, sir.

Q. How did you consider that it was forfeited before the expiration of the time for its performance?

A. Because we knew that it was an impossibility to comply with the condition of that deed in fifteen days.

Q. Then what you mean to say is that you thought it would be forfeited, not that it had been?

A. If Mr. Brooks had complied with the conditions of that deed the trustees would have been compelled to give him a deed of the road on the first day of January, 1881, but we entered into an arrangement or contract with the Kansas City & Southern Railway Company before that date, because they said that they had, as expressed in the contract, all the rights that Brooks and the Southern Construction Company had, if they had any rights at all.

Q. But you do not mean to say that the contract to Brooks had been in fact and in law forfeited before the expiration of
496 the time of its performance, but you only mean to say that you thought it would be impossible for him to complete it within the time?

A. If Brooks had any right or the Southern Construction Company, we were informed by Mr. Young, representing the Kansas City & Southern Railway Company, that the Southern Railway Company had those rights. Therefore we did not feel that we were selling the property twice in that respect, if we made a contract with them before the first day of January, 1881.

Q. By the contract you made before the first day of January, 1881, you simply recognized the fact that the Kansas City & Southern Railway Company had become possessed of Brooks' rights, whatever they were, did you not?

A. Yes, sir; that is recited in the contract.

Q. And that the Kansas City & Southern Railway Company had assumed when they purchased from Brooks to build the road in accordance with the terms of the deed to Brooks, but had been unable to do so?

A. The trustees, as far as I was concerned, knew nothing of this transfer from Brooks to the Kansas City & Southern Railway Company until the Kansas City & Southern Railway Company wanted to change the terms of that deed or make a new contract whereby there would be another time given to build the railroad.

Q. The Kansas City and Southern Railway Company, through some of its agents, came to the trustees and asked for these changes in the terms and for an extension of time, did they not?

A. The Kansas City & Southern Railway Company, through J. E. Young, its officer, assured the trustees that they would build the road, and that they were willing to put up twenty-five thou-
497 sand dollars in a Kansas City bank as a guaranty that they were in good faith. The object of the trustees was to get the

road built, and they were willing to make this contract with the new company.

Q. The Kansas City & Southern Railway Company also requested, did they not, that in order that they might be able to complete the road the conditions in the original deed to Brooks should be annulled and these other conditions should be substituted?

A. Yes, sir.

Q. Was there anything in the contract of December 15, 1880, about making a deed to the Kansas City & Southern Railway Company?

A. It says that the trustees should give an instrument in writing evidencing full compliance with the performance of all conditions.

Q. That is all, is it?

A. That is all I see by reading it over.

Q. The trustees had made a good deed to Brooks, had they not?

A. They had made a conditional deed to Brooks.

Q. But that deed was good, providing the conditions were either performed or waived?

A. Yes, sir.

Q. And the Kansas City & Southern Construction Company on the 18th day of September, 1880, had executed the instrument which you have looked at purporting to convey the property to the Kansas City & Southern Railway Company?

A. Yes, sir.

Q. Then the contract was made between the trustees and the Kansas City & Southern Railway Company by which their
498 title under Brooks was recognized, and it was agreed that the new conditions should be substituted for the old?

A. The deed to Brooks and the construction company was recognized by their saying that they were unable to comply with and perform said conditions within the time specified, which notice to the trustees was an entire forfeiture of that deed.

Q. That is your opinion as a lawyer, is it?

A. That is my opinion as a trustee only, acting for the rest of the subscribers.

Q. I read from the contract of December 15th, 1880, as follows:

"And whereas the title to said property, subject to said conditions, has, by sundry mesne conveyances, passed to and vested in and is now owned and held by the Kansas City & Southern Railway Company." I will ask you if you do not now and did not then consider that as a recognition of the title of the Kansas City & Southern Railway Company under and by virtue of this deed from Brooks and the construction company.

A. It would be provided that the Kansas City & Southern Railway Company could build the road and comply with the terms of the contract in sixteen days more, which I, having had some experience in railroad building, knew was an impossibility.

Q. But you waived the requirement that it should be built in the fifteen days, and you annulled and extinguished that condition entirely and substituted others in its place, did you not?

A. We virtually made a new contract, whereby twenty-five

thousand dollars was immediately put into a bank to be forfeited in case they did not do certain things before the first day of October, 1881, and then the whole property entirely should again
499 revert or be forfeited to the trustees. Our object was to get the road built.

Q. Your object was to get the road built, and in order to accomplish that object you provided in this agreement that the Kansas City & Southern Railway Company should be released from the agreement to build it by the date named in the deed and Brooks should have further time and put up a certain sum of money as a guaranty of good faith. Isn't that so?

A. I think that is expressed in the contract fully.

Q. Who represented the Kansas City & Southern Railway Company in the negotiations which led to the execution of this paper of December 15, 1880?

A. I think it was mostly J. E. Young. Some other officer may have talked with the trustees, but I think that most of these negotiations we conducted through Mr. Young.

Q. Was anybody there during those negotiations representing the Kansas City & Southern Construction Company?

A. I think not.

Q. Mr. Brooks was not there?

A. I think not.

Q. Then this agreement of December 15, 1880, was made without any conference with or negotiation with the Kansas City & Southern Construction Company?

A. The trustees were informed that the Kansas City & Southern Construction Company had parted with whatever interest they might or could have had, transferring it over to the Kansas City & Southern Construction Company.

Q. And therefore you did not think it necessary to negotiate at all with the Kansas City & Southern Construction Company?

A. We were informed that they had no further interest in it.
500 Q. You were informed, were you not, that their interest had passed to the Kansas City & Southern Railway Company, and that it was only necessary to deal with the latter company?

A. If they had any interest in it, whatever it might be, we were informed that the Kansas City & Southern Railway Company now owned it. It is so recited in the new contract.

Redirect examination by Mr. O'GRADY:

Q. What interest did you, as trustees, consider the construction company had in the old Kansas City, Memphis & Mobile road at the time you made this contract of December 15, 1880, with the railway company?

A. Absolutely nothing.

Q. What interest did you, as trustee, consider the construction company had on the 18th of September, 1880, when it made a quit-claim deed to the Kansas City & Southern Railway Company?

Objected to by counsel for complainant as calling for witness's

opinions on a question of law growing out of the construction of contracts, deeds, etc.

Q. Under the conveyance to them from Brooks they had the right to build the road to Benton or Harrisonville or to spend fifty thousand dollars before the first day of January, 1881, and then to own the property if they had done so.

Q. And if they had not done so, what?

A. If they did not do that they had no interest whatever in any way, shape, or manner, according to the ideas of the trustees as parties to the first deed.

Q. In your cross-examination by Judge McCreary you stated that the contract between the trustees and the Kansas City & Southern Railway Company, dated December 15, 1880, was a new con-
501 tract. State fully all about why you considered it a new contract.

A. The trustees knowing that the conditions of the first deed could not be complied with, and the Kansas City & Southern railway coming there and offering to put up twenty-five thousand dollars in a bank, we virtually, or thought we did, made a new contract with them whereby this twenty-five thousand dollars should be absolutely forfeited and the property revert again to us or be forfeited and released from the contracts which we had made, if the forty thousand dollars had not been expended on the first day of October, 1881. We considered that the road-bed would be again ours free from all incumbrances if the Kansas City & Southern Railway Company did not spend forty thousand dollars of it before October 1st, 1881, and in consideration of their depositing the twenty-five thousand dollars in a bank in our names we thought they were in good faith and therefore made this new contract with them, expecting and believing that the road would be built by them.

Recross-examination by Mr. McCREARY:

Q. The construction company paid in cash a little over nineteen thousand dollars for the property, did they not?

A. Mr. Brooks did.

Q. Mr. Brooks acted for the construction company, which was then in contemplation, did he not?

A. I think Mr. Brooks took the deed in his name and the trustees did not know who he was associated with at that time.

Q. The consideration was paid in cash?

A. The consideration was paid in cash, and we would have made just that much clear on the first day of January, 1881, but the object of the trustees was not to make money but to get the
502 road built; therefore they made the new contract with the railway company.

Q. At the time, then, that the construction company made the deed to the railway company they held the title to that property, subject to the condition named in the deed to Brooks, did they not?

A. Certainly.

Q. And they had the right to go on and perform those conditions

or to sell the property to some one else who might perform them, or they had the right to apply to the trustees, as the Kansas City & Southern Railway Company afterwards did, for an extension of time or for the modification of the terms?

A. Certainly.

STATE OF ILLINOIS, }
County of Cook, } ss:

I, A. L. Davison, a notary public within and for the county of Cook, in the State of Illinois, do certify that on the first day of April, A. D. 1889, came before me John D. Bancroft, at Chicago, in the county and State last aforesaid, who was by me sworn to testify the whole truth of his knowledge touching the matter in controversy wherein Berthold Schlesinger and others are plaintiffs and The Kansas City and Southern Construction Company and others are defendants; that he was examined and his examination reduced to writing by me and the signature of his deposition waived by counsel on said day and his said deposition is now herewith returned.

A. L. DAVISON,
Notary Public, Cook County, Illinois,

503 And on Monday, the 22nd day of October, A. D. 1889, there was presented to the court an appeal bond in said cause; which bond is approved by the court and ordered filed and is as follows, to wit:

In the Circuit Court of the United States, Western District of Missouri, Western Division.

BERTHOLD SCHLESSINGER and SEBASTIAN SCHLESSINGER
vs.
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY, The Kansas City & Southern Construction Company, The Farmers' Loan & Trust Company, and James I. Brooks. } In Equity.

Know all men by these presents that we, George R. Nettleton and Wallace Pratt, of the city of Kansas, county of Jackson and State of Missouri, are held and firmly bound unto the Kansas City & Southern Railway Company, the Kansas City & Southern Construction Company, the Farmers' Loan & Trust Company, and James I. Brooks and their successors, executors, and administrators in the sum of five hundred ($500) dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of October, 1889.

Upon this express condition, to wit, whereas the above-named Berthold Schlessinger and Sebastian B. Schlessinger have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the cause above named by the circuit court of

the United States for the western division of the western district of Missouri:

Now, if the above-named Berthold Schlessinger and Sebastian B. Schlessinger shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to make good their
504 plea, then this obligation to be void; otherwise to remain in full force and virtue.

GEO. H. NETTLETON. [SEAL.]
WALLACE PRATT. [SEAL.]

The above bond is hereby approved and ordered to be filed and made a part of the record.

JNO. F. PHILIPS, *Judge.*

UNITED STATES OF AMERICA, }
Western District of Missouri. }

We, George H. Nettleton and Wallace Pratt, obligors in the foregoing bond, being duly sworn, on our oaths do depose and say that we reside as stated therein, and that we are each worth, over and above all debts and liabilities, the sum of more than five hundred dollars, and that we each own real estate to that amount subject to execution in the State of Missouri.

GEO. H. NETTLETON.
WALLACE PRATT.

Subscribed and sworn to before me this 22nd day of October, 1889.

Witness my hand and notarial seal.

[SEAL.]

I. P. DANA,
Notary Public.

505 UNITED STATES OF AMERICA, *set:*

I, Warren Watson, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the foregoing is a true and complete transcript of the record in the cause therein named as fully as the same appears in my office.

Witness my hand as clerk and the seal of said court. Done at office, in the city of Kansas, Missouri, this 13th day of September, A. D. 1890.

{ Seal of the United States Circuit Court, Western }
{ Division, for the Western District of Missouri. }

WARREN WATSON, *Clerk.*

Endorsed on cover: Case No. 14,258. W. Missouri C. C. U. S. No. 243. Barthold Schlesinger and Sebastian B. Schlesinger, partners doing business under the firm name and style of Naylor & Company, appellants, *vs.* The Kansas City & Southern Railway Company, The Kansas City & Southern Construction Co., The Farmers' Loan & Trust Co., and James I. Brooks. Filed October 13, 1890.

Supreme Court U. S.
FILED,
JAN 8 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

TERM No. 243.

IN EQUITY.

BARTHOLD SCHLESINGER AND SEBASTIAN B. SCHLESINGER, Partners doing business under the firm name and style of NAYLOR & COMPANY, *Appellants*,

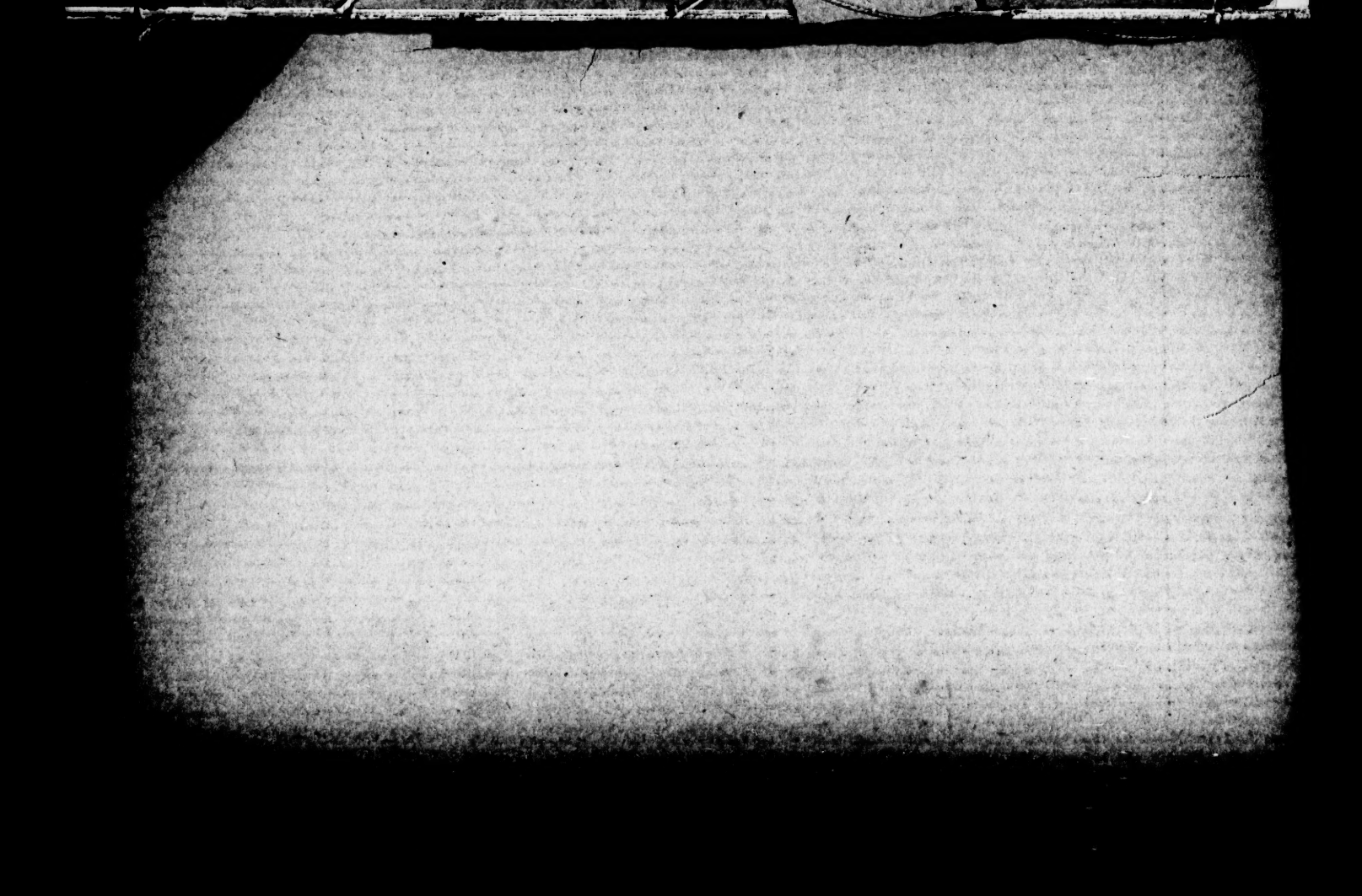
vs.

THE KANSAS CITY AND SOUTHERN RAILWAY COMPANY, THE KANSAS CITY AND SOUTHERN CONSTRUCTION COMPANY, THE FARMERS LOAN AND TRUST COMPANY AND JAMES I. BROOKS, *Appellees*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

APPELLANTS' BRIEF.

WALLACE PRATT,
JEFFERSON BRUMBACK,
FRANK HAGERMAN,
For Appellants.



Supreme Court of the United States.

OCTOBER TERM, 1893.

BARTHOLD SCHLESINGER *et al.*,
Appellants,
vs.
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*,
Appellees.

In Equity.
No. 243.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

APPELLANTS' STATEMENT.

This is an appeal by complainants from a decree of the Circuit Court of the United States for the Western District of Missouri, dismissing their creditors' bill, which had been brought to subject railroad property in the hands of the Kansas City & Southern Railway Company to the payment of their demand against the Kansas City & Southern Construction Company. (Decree, Rec. 58, 59.)

Upon October 7, 1881, appellants, doing business under the firm name of Naylor & Co., as plaintiffs, instituted in the Circuit Court of Jackson County, Misssouri, an action at law against the Kansas City & Southern Construction Company to recover a balance due on a contract of date of March 2, 1880, for the purchase of steel rails. The action

s

was aided by attachment. Writs were issued to the counties of Jackson, Cass, Henry and St. Clair and on October 10, 1881, levied upon what was formerly known as the roadbed, right of way, masonry and bridges of the Kansas City, Memphis & Mobile Railroad Company. The cause was removed to the United States Circuit Court for the Western District of Missouri, where on February 1, 1886, a judgment was rendered sustaining the attachment and fixing the amount of plaintiffs' claim at $35,901.39. (Bill, Rec. 13-15, par. IV; p. 19, par. VIII; Answer, p. 28, lines 9-16; p. 31, lines 17-19; Record in Attachment, p. 129-133; Returns on Attachment Writs, p. 141-144.)

The state statute (Rev. Stat. 1879, Sec. 448, set out in appendix hereto) expressly provides for a bill in equity in aid of an attachment. This being a *right* enforceable in equity by the federal courts, according to the doctrine of this court (*Clark v. Smith*, 13 Pet. 195; Broderick Will case, 21 Wal. 520; *Holland v. Challen*, 110 U. S. 15) appellants, as complainants, on November 10, 1881, filed in the court below a bill in equity against the Kansas City & Southern Railway Company as the sole defendant. The purpose and object of the bill was to charge the attached property with the payment of the debt due from the Construction Company, and the averment was that such property had, on May 24, 1880, been fraudulently conveyed by the Construction Company, the then owner, to the Railway Company and that no consideration was paid for the conveyance. (Original Bill, Rec. 1-4.)

On July 23, 1884, there was filed for record for the first time another conveyance from and to the same parties, which was dated September 18, 1880. (Bill, Rec. 16, lines 3-5; Ans. p. 29, lines 14-17.) Thereupon, on December 15, 1884, appellants filed an amended and supplemental bill, charging that deed and also that of May 24, 1880, to have been without consideration and made fraudulently for the

purpose of defrauding them as creditors. By this amended bill the Construction Company, the Farmers Loan & Trust Company and James I. Brooks were made additional parties defendant. (Amended Bill, Rec. 11-20.) Thereafter, on April 7, 1887, a short supplemental bill was filed, showing that appellants in the law action had on February 1, 1886, recovered a judgment sustaining their attachments and assessing their damages at $35,901.39. (Sup. Bill, Rec. 33, 34.) On February 2, 1885, the Railway Company filed an answer, which, stripping it of its verbiage, attempts to set forth three substantial defenses: (1) That the attachment levies were void because the nature of the property was such that it was not subject to levy. (2) That the Construction Company never owned the property in question and had no power to hold the same. (3) That the Railway Company owned the property, but that it disclaimed title under or through either of the deeds made the subject of attack by the bill, admitting that there was no consideration for either. (Answer Railway Co., Rec. 25-31.) Defendant Brooks filed an answer admitting that the deeds attacked by the bill were fraudulent and void, but claiming the property for himself by virtue of a deed from the Construction Company to himself as trustee, of date of May 18, 1891. (Answer of Brooks, Rec. 40-42.) The Farmers Loan & Trust Company filed an answer setting forth that it was a trustee under a mortgage on the property executed by the Railway Company of date of January 1, 1883, to secure an issue of bonds, and asking that its rights be protected. (Answer Trust Company, Rec. 42-48.) To these answers replications were duly filed. (Rec. 32, 49.) The Construction Company was served under proper orders for substituted service upon John O'Grady, its attorney, who defended the law action for it, (Rec. 34, 35, 39) but it neither appeared nor filed an answer. Neither Brooks nor the Trust Company offered any proofs nor took any part in the

trial. The substantial and only contest was between the complainants and the Railway Company.

While the record is large and is made up with many duplications, yet, after reading the original (Rec. 1–4), amended (Rec. 11–20) and supplemental (Rec. 33–34) bills, the answers of the Railway Company (Rec. 25–32) and of Brooks (Rec. 40–42), the whole case can be understood and *all* the evidence examined, by following as a reference index the following statements as to the proofs:

1. The stipulation of the parties admitting that the property in controversy was incorporated into the line of defendant Railway Company. (Rec. 52, 53.)

2. The record in the proceedings of bankruptcy of the Kansas City, Memphis & Mobile Railroad Company (Rec. 105–110) showing an adjudication in bankruptcy and the appointment of assignees.

3. Deed of the property in question from the Assignees in Bankruptcy to John D. Bancroft, dated April 25, 1877 (Rec. 111), and deed of date April 27, 1877, from Bancroft to Hanna, McLean and Bancroft as trustees (Rec. 114–115) for certain citizens who contributed $15,300 as the purchase money therefor.

4. Contract of November 1, 1879, between a portion of such contributors representing $7,500 and James I. Brooks (Rec. 243) for the sale of the property, which was never completed and by its terms was of no effect.

5. Deed from Hanna, McLean and Bancroft, trustees, to James I. Brooks, upon certain conditions, dated January 13, 1880. (Rec. 117.)

6. Declaration of Brooks that such purchase was for the Construction Company, dated February 27, 1880 (Rec. 121), and deed of Brooks, pursuant to this declaration, of date April 1, 1880. (Rec. 122.)

7. Deed of Construction Company to Kansas City &

Southern *Railroad* Company of date of May 24, 1880, and recorded June 12, 1880 (Rec. 4–6), being one of the deeds challenged by the bills, and as to which the Railway Company disclaimed.

8. Deed of Construction Company to *Railway* Company, dated September 18, 1880 (Rec. 21–22), being the second deed challenged by the amended bill, and as to which the Railway Company disclaimed.

9. Contract between Hanna, McLean and Bancroft. as trustees, with the Railway Company, *as an assign of Brooks*, dated December 15, 1880, changing the conditions of the deed by the trustees to Brooks. (Rec. 244–247.)

10. Deed of Construction Company to James I. Brooks, dated May 11, 1881 (Rec. 23), under which Brooks by his answer claimed title.

11. Mortgage by the Railway Company of all its property and *income* to the Farmers Loan & Trust Company to secure $6,500,000 of *first* mortgage bonds dated January 1, 1883 (Rec. 145–153), and attested by Tenney as secretary, and which mortgage warranted the title to the property.

12. Report of the Railway Company to the State Board of Railroad Commissioners for the year ending December 31, 1883, sworn to April 17, 1884, showing that the road was then under construction; that Amos Tenney was still secretary; *that the Company had no income bonds outstanding and no indebtedness other than the indebtedness secured by the mortgage to the Trust Company* (Rec. 154–167); a similar report to same effect for the year 1886, sworn to August 19, 1887, and also showing that John O'Grady, the attorney for the Construction Company, was the assistant secretary and general solicitor of the Railway Company, and that the earnings were but $16,433.33 for the year, while the expenses, exclusive of interest on bonded debt, were $33,318.55.

13. Contract between complainants and the Construction Company, dated March 2, 1880, for steel rails (Rec. 198–199), the purchase price aggregating $255,000.

14. Declaration of Construction Company, dated May 18, 1880, of its inability to comply with the contract, and directing complainants to sell the rails (Rec. 199); and the account, after making sales, showing balance due complainants. (Rec. 200–201.)

15. Petition of complainants in the law action against the Construction Company (Rec. 129, 130), answer of defendant (Rec. 130), interplea of Railway Company claiming the property attached and averring that it was not subject to attachment (Rec. 130-132), answer of plaintiffs thereto (Rec. 132), verdict and judgment, October 20, 1885, for $49,448.11, *sustaining attachment, and subjecting the property to the payment of the judgment* (Rec. 133), record entry showing motion for new trial filed by both Construction and Railway Companies (Rec. 133), judgment of February 1, 1886, *sustaining the attachment* but reducing the finding to $35,901.39 (Rec. 134), and returns on the writs of attachment in such law action which were issued to Jackson, Cass, St. Clair and Henry Counties, Missouri (Rec. 141-145), and levied on October 10, 1881.

16. Articles of Incorporation of the Construction Company dated February 16, 1880, showing that Amos Tenney was president, and a director, holding 1105 shares of stock, and James I. Brooks a director, holding 1175 shares, out of a total of 2500 shares. (Rec. 127.)

16. Deposition of Sebastian Schlesinger, one of complainants, showing the indebtedness due to complainants. (Rec. 181-198.)

17. The depositions of Wm. C. Burke (Rec. 212), Frank S. Ware (Rec. 213), William Miller (Rec., Q. 161) and J. B. Colt (Rec. 252), showing that the property in question was constructed in 1871, appropriated by the Rail-

way Company in 1882, and its value was largely in excess of the amount of complainants' debt.

18. Depositions of defendant James I. Brooks (Rec. 204-210), Amos Tenney (Rec. 231-241), the officer of the Construction Company and the Railway Company who manipulated the alleged transfers, and Thomas Hanna (Rec. 255-261), Benj. McLean (Rec. 261-274), and John D. Bancroft (Rec. 279-289), the trustees who executed the original deed to Brooks and the contract of December 15, 1880, with the Railway Company. No brief statement as to these last named witnesses can be fairly made. When read in the light of the other facts in the case, the court will appreciate the force of our general statement that this property, which was all that the Construction Company owned, was illegally shifted from one company to another to avoid a just indebtedness.

Upon the pleadings and proofs an opinion was handed down by Mr. Justice Brewer, then circuit judge, upon which a final decree was entered dismissing the bills, to reverse which this appeal is prosecuted. (Opinion Rec. 53-58, set out in the appendix hereto; Decree, p. 58-59.) The opinion was in our judgment a radical misconception of the facts as admitted in the pleadings and proven by the testimony. Before noticing the particular matters as to which the learned trial judge erred, we will undertake to state the facts in a general way, fortifying each statement with a reference to the record.

The property sought to be subjected is what is known as the right of way, road-bed, bridges and masonry of the Kansas City, Memphis & Mobile Railroad Company, extending one hundred and twelve miles from Kansas City through the counties of Jackson, Cass, Henry and St. Clair, to Osceola, Missouri, in the latter county. (Bill. Rec. 12, Par. 11, Ans. p. 28; Stipulation, 52, 53; Ev. Miller, p. 216–224.) The Kansas City, Memphis & Mobile Railroad Company in

1871, (Ev. Ware, 213; Miller, p. 216–224; Colt, 252–254), constructed the line, but before making a completed railroad it was adjudged a bankrupt. (see Adjudication, Rec. 105–110). The property was, by the assignees in bankruptcy, on April 25, 1877, sold (Rec. 111) to John D. Bancroft, and here, it may be remarked, is a common source of title, *for the answer of the Railway Company claims title from Bancroft.* The latter purchased for a number of citizens of Kansas City, who contributed the purchase money, with a view of controlling the road in the interest of the city. Bancroft on April 27, 1877, conveyed (Rec. 114) to Hanna, McLean and Bancroft, as trustees, for the contributors of the purchasing fund. November 1, 1879, a *portion* of the contributors made a contract to sell the property to James I. Brooks, *but this contract never went into effect*, and by its terms was void, because a majority of the contributors failed to sign it (Rec. 243). January 13, 1880, the trustees sold to Brooks, inserting in their deed (Rec. 117) a condition that the title should revert, in case the road was not completed to the coal fields of Bates County, Missouri, by July 1, 1881, but this provision as to reverting was to be of no effect if $50,000 should be expended in constructing the road. Brooks bought for a construction company which he contemplated organizing, and on February 27, 1880, executed a declaration of trust (Rec. 121) that he held the title for the defendant Construction Company, which was organized on February 16, 1880, between the dates of his purchase and declaration. On March 2, 1880, complainants entered into a contract with the Construction Company by which the latter agreed to purchase 5,000 tons of steel rails at a price aggregating $255,000, upon which was paid $50,000. Naylor & Co., upon the strength of this contract, *went on the market and purchased the rails at the prevailing prices.* (Contract, Rec. 198, 199; Ev. Schlesinger, Rec. 182, Q. 6, 7, p. 185, Q. 40.) On April 1, 1880, pursuant to his declaration of trust of date

February 27, 1880, Brooks conveyed the property to the Construction Company. (Deed, Rec. 122, 123.) In the meantime the market price of steel rails had declined. (Ev. Schlesinger, Rec. 185, Q. 38; Ev. Tenney, Rec. 238, 239.)

The Construction Company had no property other than that in question. (Bill, Rec. 17, Par. 6, Ans. 30, lines 10, 11; Ev. Brooks, 204, 205, Q. 6, 7, 14, 15.) In May, 1880, the company failed, became embarrassed, and subscribers refused to pay more money, all because the contract with complainants, as expressed by defendant's chief witness, "bankrupted the company." (Ev. Tenney, Rec. 232, lines 41, 42, p. 237, lines 28-30, p. 239, lines 29, 30.) Thereupon, on May 18, 1880, Brooks, as the president of the Construction Company (having become such since March 2, 1880). wrote Naylor & Co. that the company was unable "at the present time" to carry out the contract for the rails, and directed a sale of the rails *without any prejudice to a claim for damages against the Construction Company.* (Letter, Rec. 199; Ev. Schlesinger, 182, Q. 12, 13.) This complainants did, and after crediting the proceeds of the sales there was still due on the contract a large sum of money, representing an actual loss in cash. (Ev. Schlesinger, Rec. 181-186; Account, Rec. 199.) The account includes an item of "five per cent commission and *del credere*, $10,898," about which some ado was made below, but it was this item with interest from the date of filing the suit at law for which a remittitur was entered (Rec. 134) on February 1, 1886. Six days thereafter, and on May 24, 1880, the Construction Company conveyed the property in question, which, as has been seen, was all it possessed, to the Kansas City and Southern *Railroad* Company for the *expressed* consideration of $300,000 of stock and $300,000 of mortgage bonds "to be issued." (Deed, Rec. 5, 6.) The consideration was never in fact paid. (Bill, Rec. 16; Ans. Ry. Co., 29; Ans. Brooks, 40, 41, par. 5; Ev.

Tenney, Q. 35, lines 46–50.) The deed was made with the intention of organizing a railroad company to receive the title. (Ev. Tenney Rec. 235, lines 46–50.) The defendant Railway Company was incorporated June 10, 1880 (Ev. Tenney, 235, lines 1–4); so the bill avers (Rec. 15, par. 5) and the answer does not deny it. But when it came to the incorporation of the company it was named the Kansas City & Southern *Railway* Company, and not the Kansas City & Southern *Railroad* Company as designated in the deed. On June 12, 1880, just two days after the incorporation of the Railway Company, the deed of May 24, 1880, was filed for record. (Endorsement on deed, Rec. 6.) And it may be noted in passing that the deed was signed by the proper officers of the Construction Company, and, as there was no grantee to whom delivery could be made prior to June 10, 1880, it is a little remarkable that *no explanation was offered as to why or how it came to be recorded or got out of the possession of the Construction Company if it was not then intended to pass title.* We therefore claim that the deed must have been intended for, and received by, the Railway Company. If so it is confessedly a fraud. Amos Tenney was the secretary, director and manager of *all* the financial affairs of the Railway Company. (Ev. Tenney, Rec. 233, lines 20, 21, p. 234, lines 46–48; 235, lines 1–4; p. 236, lines 45–47; p. 241, lines 9, 10. Deed of trust, Rec. 153; Report to R. R. Commissioners, 1883, Rec. 155.) He was director and owner of 1105 of the 2500 shares of stock of the Construction Company. (Art. of Incorp., Rec. 127; Ev. Tenney, Rec. 237, line 1; p. 241, lines 9, 10.) Brooks was the owner of 1175 shares of the stock of the Construction Company, was a director therein, at one time treasurer and then president and manager for Missouri. (Art. Incorp., Rec. 127; Ev. Brooks, Rec. 204, Q. 2; p. 206, Q. 2, 3, 7, 10; p. 207, Q. 12-15; Ev. Tenney, Rec. 232, lines 30-32.) Up to June 12, 1880, the date of recording the deed of May 24, 1880,

Tenney and Brooks seemed to act harmoniously, although there was a difference between them as to making further payments on the contract for steel rails—Tenney objecting thereto. (Ev. Tenney, Rec. 239, lines 21-29.) About September, 1880, Brooks and Tenney evidently entered into a contest for the control of the Construction Company, for Tenney testified that Brooks was ousted on September 17, 1880. (Ev. Tenney, Rec. 234, lines 10-32; p. 238, lines 32-37.) Brooks, however, testified to the contrary, and said that an unsuccessful fraudulent effort was made to remove him. (Ev. Brooks, Rec. 206, Q. 7-11; p. 207, Q. 12-30; p. 208, Q. 31-47.) *No one produced a record, and it is impossible to form any intelligent idea as to who told the truth about the matter.* All inferences are against the Railway Company, because its relations to the Construction Company were such that it could have explained and made clear what otherwise is left in doubt. John O'Grady was assistant secretary and general solicitor of the Railway Company. (Rep. to R. R. Comrs., 168.) He signed the answer as solicitor for the Railway Company (Rec. 31) and took part in the examination of nearly every witness. (Rec. 181, 186, 204, 206, 213, 220, 231, 264, 279, 280.) He also appeared in the attachment suit as the attorney for both companies. (Rec. 133, 134.) The court below found that he was the representative of the Construction Company, for that court, after a hearing, ordered substituted service upon that company by service upon him (Rec. 34-35). Thus we find wherever we turn the same officers representing both companies. On September 18, 1880, *one day after* the date Tenney claims that Brooks was ousted, a quit claim deed was executed by the Construction Company to the Railway Company (Deed, Rec. 21-23) for an expressed *paid* consideration of $250,000 *cash*. This deed was signed "Henry Ashley, Agent," instead of being signed by the president or presiding officer, as required by the state statute (Rev. Stat. Mo. 1879, Sec. 672, 743). It was therefore illegal. It was

never recorded until July 23, 1884 (Bill, Rec. 16, lines 3-5; Ans. Rec. 29, lines 14-17), *and no explanation was at any time made for so concealing the deed.* The expressed consideration was not in fact paid. (Answer, Ry. Co. Rec. 29; Ans. Brooks, Rec. 241; Ev. Tenney, Rec. 236, lines 33-37.) Tenney testified, however, that the consideration was $100,000 in income bonds. (Rec. 236, 238-241.) These bonds, *if given*, were worthless. At most they were in the eyes of the law no lien and the result is that the alleged consideration was in the paper of the grantee. There is no pretense that these bonds were ever in fact paid. The weight of the evidence was overwhelmingly against Tenney's statement as to a consideration. This testimony will be hereafter stated in detail. J. E. Young was chief engineer, of the Construction Company and also engineer of the Railway Company. (Ev. Tenney, Rec. 232, lines 30, 31, p. 237, lines 38 41.) Young represented to Tenney that "he had parties who would join him in a contract with the Railway Company to build a road." (Ev. Tenney, Rec. 233, lines 32-36.) Tenney then directed Young "to go to Kansas City and see if he could make a purchase of the road." (Ev. Tenney, Rec. 233, lines 22-24.) When this occurred is not clearly disclosed. Young came to Kansas City and some parties, representing *both* the Railway and the Construction Company, applied to the trustees for an extension of time on the conditions for reversion in the trustees' deed to Brooks. (Ev. McLean, Rec. 269, lines 8-21; p. 271, lines 28-30; p. 273, lines 8-10; Ev. Bancroft, Rec. 285, lines 24-29.) Thereupon on December 15, 1880, the trustees executed a contract, *not a deed*, reciting, *first*, that the Railway Company had by mesne conveyances from Brooks succeeded to the title; (this was conclusive evidence that it then claimed under the Construction Company (*Carver v. Jackson*, 4 Peters, 1, 83), and as the deed of May 24, 1880, was then only of record, it must have been that the claim then was under that deed.)

Second, that the conditions in the Brooks deed were annulled and in lieu thereof the Railway Company, as a guaranty of good faith of the building of the road, had deposited with the trustees $25,000 to be expended by them in the construction of the road upon the estimates and orders of the chief engineer, and as soon as the $25,000 and $15,000 additional was expended, the Railway Company was to hold the title free from all conditions. If the $25,000 was not expended by July 1, 1881, the unexpended amount was to be forfeited to the trustees. If $40,000 was expended by October 1, 1881, then the trustees were to acknowledge in writing a full compliance with the terms of the contract, but if said $40,000 was not in that time expended, then the title was to revert according to the conditions of the Brooks deed. (Contract, Rec. 242, 247.) It will be observed that the only consideration was money to be advanced by the Railway Company in the construction of its own road. As a matter of fact Young, the engineer, with certain of his friends, under the firm name of "Smith & Co.," advanced the money and took a contract for the construction of the road, and this was contemplated when Tenney arranged to obtain title for the Railway Company. (Ev. Tenney, Rec. 233. lines 31-39.) The $15,000 was not, however, advanced till "about ten days prior to the expiration of the stipulated time" in the contract of December 15, 1880. (Ev. Tenney, Rec. 233, lines 48–50.) Thereafter the road of the defendant Railway Company was completed and incorporated therein was the property in question. (Stipulation, Rec. 52, 53.) The property appropriated exceeded in value the sum due complainants. (Ev. Burke, Rec. 212–213; Ware, p. 213–214; Miller, p. 216–229; Colt, p. 252–254.) The actual work of construction began December 14, 1882. (Ev. Miller, Rec. 219, Q. 29.) On December 31, 1883, the road was still in the course of construction and had no equipment (Report to R. R. Comrs. Rec. 154–167).

Brooks, as president of the Construction Company, on May 18, 1881, conveyed the property to himself as trustee upon certain undefined trusts. (Deed Rec. 23.) He filed an answer asserting this title (Ans. Rec. 40–42), but no proofs were offered thereon and the nature of the trusts was never disclosed. On April 25, 1883, the Railway Company acknowledged the execution of a mortgage of date January 1, 1883, conveying all the railway property and its income to secure an issue of $6,500,000 of *first* mortgage bonds. The mortgage used the language "doth grant, bargain, sell, assign, transfer and confirm," which language under the State Statute (Rev. Stat. Mo. 1879, Sec. 675) is a covenant of warranty.

As already seen the attachment suit for the debt due complainants was instituted October 7, 1881. Writs of attachment were issued to Cass, Henry, Jackson and St. Clair Counties and levied on the property in question as belonging to the Construction Company. The suit was removed to the federal court. An answer was filed by the Construction Company. The Railway Company pursuant to a state statute so authorizing (Rev. Sts. Mo. 1879, Sec. 449) filed what is known as a statutory interplea, claiming to own the property and that the levies were ineffective because the nature of the property was such that it was not subject to levy. The complainants filed an answer to such interplea, and on October 20, 1885, recovered judgment for $49,448.11, the order further reciting that plaintiffs should "*have thereof execution to be levied of the property, and effects attached*, and that this judgment and all executions issued thereon *hold not only the property attached*, but the other property of defendant." Motions for new trial were filed by both the Railway and Construction Company. On February 1, 1886, a remittitur for $13,546.72 was entered and a new judgment rendered against the Construction Company for $35,901.39, the order reciting that the judgment and execution thereon should hold the property

attached, but that no execution should issue till this suit in equity was disposed of. (Bill, Rec. 2, 3, 13–15, 19; Ans. p. 28–31; Petition in attachment p. 129–130; Answer thereto p. 130; Interplea p. 130–132; Answer thereto p. 132; Judgment Oct. 20, 1885, p. 133; Order reciting motion for new trial p. 133; Judgment February 1, 1886, p. 134; Returns on Attachment p. 141–144.) The sum of $13,546.72 thus remitted was intended to and did cover the item of account (Rec. 201) "five per cent commission and *del credere* $10898" with interest thereon from the date of the institution of the suit.

Some point was attempted to be made below as to a sale of complainant's claim, and it might as well be mentioned here that after litigating from October 7, 1881, according to Mr. Schlesinger, whose deposition was taken April 22, 1885, (Rec. 189) complainants within a year of the latter date sold their claim to one Sargent for $4,000. (Ev. Schlesinger, Rec. 189, Q. 71–74.)

The real question before the court is whether the Railway Company acquired a good title from the Construction Company as against the debt due complainants. We have seen that by the contract of December 15, 1880, it was recited that the Railway Company was an assign of Brooks. No writings or deeds were produced suggesting a passage of title from the Construction Company, unless it was by virtue of the deeds of May 24, 1880, and September 18, 1880. Our claim as to these deeds is that they were not only made without consideration, but between officers of both companies for the fraudulent purpose of evading the payment of a just indebtedness.

This brings us to the opinion of Mr. Justice Brewer (Rec. 53-58), before whom, while circuit judge, the cause was tried. A copy of that opinion is set out in the appendix hereto.

This opinion, in our judgment, asserts or implies contrary to the pleadings and proofs, the following:

1. That the consideration for the transfer of the Con-

struction Company was $100,000 in income bonds, and as the only testimony on that subject was from Tenney to the effect that such payment was for the deed of September 18, 1880, the court must have meant to uphold that transaction, *overlooking that the answer of the Railway Company disclaimed title under such deed and the fact that Tenney's statements were not true.*

2. That the Construction Company abandoned the property and the Railway Company took possession—an issue neither made by the pleadings nor sustained by the proofs.

3. That there was a *serious* dispute in the testimony as to whether the Construction Company surrendered the property to the trustees who in turn made a new contract with the Railway Company. This also was not an issue made by the pleadings.

4. That there was no bad faith or effort to avoid just liabilities.

5. That the Construction Company held the title subject to *speedy* forfeiture.

6. That the value of the interest of the Construction Company was trifling.

7. That there was no equity in complainant's debt.

Permit us to go to the record as to these matters; and if our statement should border on the domain of argument, we hope we will be pardoned, as we are endeavoring to combat an able opinion from a present member of this court, and hope to convince him, with the others, that he is in error. We shall take up the objections in the order stated:

1. *The deeds of May 24, 1880, and September 18, 1880, were without consideration. The income bonds, if paid, were valueless. They were not in fact paid. But the allegations of answer forbid a contention of consideration by the Railway Company.*

(*a*) The original bill (Rec. 1-4) filed November 10, 1881, charged the deed of May 24, 1880, to be fraudulent and without consideration. The deed of September 18, 1880, was first filed for record July 23, 1884. (Bill, Rec. 16, lines 3-5; Answer, Rec. 29, lines 14, 15.) On December 15, 1884, an amended bill (Rec. 11-20) was filed charging both deeds to be fraudulent and without consideration. The sworn answer of the Railway Company in reference to such charges *disclaimed title under* deeds by making (Rec. 27, 29) the following solemn averments:

"Said Kansas City & Southern Railway Company *now claims* said property and franchises thereof through mesne conveyances from said Bancroft, *outside of and independent of any conveyance or pretended conveyances of said Kansas City & Southern Construction Company to said Kansas City & Southern Railway Company.*" * * * * This defendant admits that said defendant Construction Company on May 12, 1880, executed the deed described in said bill of complaint as executed of that date to the Kansas City & Southern Railroad Company, but says that such a person, association or corporation as the Kansas City & Southern Railroad Company *never existed and that said deed is therefore null and void.* This defendant admits that on July 23, 1884, there was filed for record in the recorder's office in said Jackson County the instrument of writing or deed described in said bill of complaint as being "dated September 18, 1880. * * * *

"This defendant denies that it got possession of any deed dated May 24, 1880, and caused same to be recorded. This defendant admits that it never issued any certificate for stock to said Kansas City and Southern Construction Company, nor paid to it the sum of $250,000 mentioned in said bill of complaint, but it avers that it never received any consideration for the delivery of said stock or the payment of said money; that the said Kansas City and Southern Construction Company pretended to this defendant to be the owner of certain rights of way and franchises and property, and to be authorized to convey the same to this defendant, and did agree and promise to convey the same, and in conse-

quence of such agreement and representation, did obtain from this defendant $100,000 of its income bonds, which were the only bonds ever promised by this defendant to said defendant Construction Company. The said Construction Company, in order to render the income bonds of any value, *subsequently released the defendant Railway Company from any obligation to issue said stock.* * * * Defendant admits that said deeds assume to convey, among other property, the property owned by this defendant, *but this defendant does not derive its title to said property under said deeds.*"

Brooks, in his sworn answer (Rec. 40-41, par. 5,) as to these deeds, avers:

1. In answer to paragraph V. this defendant admits that the Kansas City and Southern Railway Company was organized as alleged, and that the conveyance of May 12, 1880, to the Kansas City and Southern Railroad Company was executed, but was never delivered, said corporation never having been formed, and was recorded without authority by the person who had it in his custody; and he further says upon information and belief that the deed of date September 18, 1880, whereby the Kansas City and Southern Construction Company purports to convey to the defendant Railway Company the property therein described, is not the deed of the said Construction Company, and was executed and delivered without any authority from said company, and that the seal affixed thereto was not the seal of said company, and that the party assuming to sign it as agent of said company was never authorized to act for said company in that behalf; and he further says that the consideration of two hundred and fifty thousand dollars, alleged to have been received by said Construction Company, was never in fact so received by said Construction Company or paid by said Railway Company."

We have the case, then, where in substance a disclaimer is filed as to part of bill charging fraud and want of consideration in the deeds of May 24, 1880, and September 18, 1880, and the remainder of the bill answered, with averments admitting the want of consideration. *All doubts must be resolved in favor of the disclaimer.* (Story Equity Pleading,

(10th Ed.) Sec. 839.) We therefore submit that upon the pleadings the Railway Company could not take a decree based on the validity of either of these deeds or the consideration passing therefor. Here, then, was a vital and fatal error of the trial judge in overlooking the force and effect of the sworn admissions of the parties.

(*b*) Not only do the pleadings concede the fraud and want of consideration in the deed of May 24, 1880, but the only witness who spoke on the subject (Tenney, Rec. 235) confesses the same, thus:

"Q. There is a deed here attached to the complaint in this case, a deed on the 4th of May, 1880, between the Kansas City & Southern Construction Company and the Kansas City & Southern Railroad Company. State what, if anything, you know about that deed? A. There never was any Kansas City & Southern Railroad Company organized. That deed was made by Brooks and never was confirmed or anything done about it. Brooks and others had talked of organizing such a corporation, but hever did."

The deed was recorded on June 12, 1880. (Rec. 6.) This was just two days after the incorporation of the Railway Company, the date of which, according to the averments of the bill (Rec. 15), undenied by the answer and by the testimony of Tenney (Rec. 235), was June 10, 1880. As already seen, the officers of the two companies were, at this time, practically the same. The Construction Company had just failed and, six days before the execution of the deed, notified the complainants that its contract for steel rails could not be carried out. Why or how it came to be recorded two days after the incorporation of the Railway Company, unless intended at the time to pass title, is in nowise explained. The answer [Rec. 29] avers that the Railway Company was released from its obligation to issue stock. That obligation, if it ever existed, is to be found alone in the deed of May 24, 1880. All these and other circumstances show a fraudulent attempt to dispose of the property.

(*c*) This brings us to the deed which, from its face, appears to have been executed on September 18, 1880, by the Construction Company to the Railway Company (Rec. 21, 22), which was signed thus: "The Kansas City & Southern Construction Company by Henry Ashley, Agent." It was acknowledged by Ashley as agent. The deed is of no validity because it is directly in the face of the Missouri Statute (Rev. Stat. 1879, Secs. 672, 743), requiring every deed of a corporation to be executed by the president or presiding officer therof. This, under the authorities cited in the argument, is a complete answer to its validity. But we submit that there was no consideration in fact.

(*d*) The consideration (Rec. 22) is stated in the deed to be:

"The sum of two hundred and fifty thousand dollars lawful money of the United States of America *to it in hand paid* by the said party of the second part *at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged.*"

Although the property was seized under attachment (Rec. 141–144) in October, 1881, and although the complainants filed a bill on November 10, 1881, (Rec. 1) charging that the property had been fraudulently appropriated by the Railway Company and should be subjected to the payment of the debts of the Construction Company, still, this deed of September 16, 1880, *was kept from the record until July 23, 1884.* So the bill avers (Rec. 16, par. V.) and the answer expressly admits (Rec. 29). No explanation was attempted as to the reason for the concealment. It is certain that the answer *disclaims a title under this deed, and admits the expressed consideration of $250,000 to be unpaid.* It avers, not that the consideration of the deed was $100,000 of income bonds, but that for such bonds the Construction Company *agreed to convey* the property at some time. In the face of all this, Amos Tenney was put on the stand as a

witness for the Railway Company, and he testified in relation to this deed that the property was actually conveyed for $100,000 of income bonds, and upon this testimony, *contrary to the admissions of the pleadings*, the trial judge placed his findings. Here is all Tenney said (Rec. 236, 237, 238, 239) on this subject:

"Q. There is a deed attached to the complaint in this case dated the 18th day of September, 1880, between the Kansas City & Southern Construction Company and the Kansas City & Southern Railway Company. State what was the consideration that passed from the Railway Company to the Construction Company for that deed. A. The consideration paid for that deed at the time of its execution was one hundred thousand dollars of the income bonds of the Kansas City & Southern Railway Company. Those bonds are still outstanding and held by parties interested in the Kansas City & Southern Construction Company. They all passed to the possession of George B. Ripley, who was the secretary and financial custodian of the assets and property of the Kansas City & Southern Construction Co. at that time; and what has become of the bonds since I have no knowledge.

Q. When did the Kansas City & Southern Construction Co. deliver to Ripley, as secretary and financial agent of the Construction Co., the one hundred thousand dollars in income bonds to which you have just testified? A. They were delivered at the time of the delivery of the deed, the 18th of September, 1880.

Q. State why, if you know, that $100,000 of income bonds were delivered by Railway Co. to the Construction Co., at the time of the execution of the deed, Sept. 18, 1880? A. I consulted Mr. Campbell, the president of the Railway Company, who is a lawyer, also the other directors, and we decided, in view that the advances made by the Construction Co., for the purchase of the property might give them an equitable claim for some consideration, as we knew at that time that they, the Construction Co., were about to forfeit their contracts with the trustees of the property, we thought best to pay them a liberal consideration for a quit claim to

the property, and did so by paying them the $100,000 in income bonds." * * *

"Q. Then I understand, Mr. Tenney, that the recited consideration of $250,000 in the deed dated September 18, 1880, was not in reality paid to said Construction Co.? A. *That was merely a hypothetical amount put into the deed without regard to what was to be paid.*" (Rec. 236.) * *

"Q. Has any interest been paid on these income bonds? A. Not to my knowledge. I am sure the Railway Company never paid any." (Rec. 237.)

"Q. Since the alleged transfer to your said Railway Co. you state said Construction Co. has had no property? A. None to my knowledge except the $100,000 income bonds paid, as heretofore testified to, to Mr. Ripley, the secretary. What became of those I don't know." (Rec. 238.)

"Q. Then all the property that the Construction Co. held you claim has passed into the hands of the Kansas City & Southern Railway Co. by the alleged transfers you have testified to. A. Yes; except the $100,000 of income bonds paid by said Railway Co. to said Construction Co.

Q. You state those bonds were paid in September, 1880. Has nothing ever been done by said Construction Co. since then; and if so, what? A. I don't recollect any business that the said Construction Co. did after that in any form. I know nothing about what became of said income bonds except what Mr. Ripley told me—that there was a judgment obtained against the Construction Co. for some $20,000 as near as I can remember, and my impression is that he said he gave some of these bonds, how many I don't know, as collateral for the judgment."

"Q. What, if anything, was paid into the treasury of said Construction Co. by your said Railway Co. for the property you state the latter acquired? A. One hundred thousand dollars of the income bonds of said Railway Co., and such were paid to quiet the title of said Railway Co." (Rec. 241.) * * *

As we challenge the statement of this witness as to the consideration, (no other speaking on the subject) and for fear the court may assume that these income bonds were issued, permit us to go further into the record to show that

these statements were not true. The claim is extraordinary in its nature: It is preposterous to suggest that on September 18, 1880, business men would, before any arrangements were made to construct a railroad, sell valuable property for income bonds. No record was shown, no writing produced, no other witness testified on the subject and no circumstances tended to corroborate Tenney's statement. The state statute (Rev. Sts. Mo. 1879, Sec. 841 set out in Appendix hereto) requires all railroad companies to file with the railroad commissioners a verified report of their assets and liabilities. The sworn report of the Railway Company for year ending December 31, 1883 [Rec. 154-156] reciting [Rec. 155] *that Tenney was still secretary and a director*, recited:

"6. Amount of funded debt (in detail.)

"The first mortgage provides for $20,000 per mile of 1st mortgage bonds, which can only be listed by trustees upon actually completed road in lengths of five miles or more. These bonds bear six per cent interest; Farmers' Loan and Trust Company of New York, trustee.

"7. Amount of floating debt (in detail.)

"Total debt————————"

Under the heading of earnings (Rec. 157) is this:

"(Written across the face.) No report; road under construction."

The same was noted under the head of "Equipment" (Rec. 161) and "Description of lines operated in Missouri" (Rec. 163), thus indicating that up to December 31, 1883, there had been no earnings whatsoever.

The report as to the earnings and expenses for 1886 (Rec. 172, 173) is:

"Earnings and income, year ending December 31, 188..

"Total earnings, main and branch lines, $16,433.63 * * * * Expenses—Continued:

Amount forward	$ 9,747.36
Salaries of officers	2,000.00
Amount expended for repairs and renewals	3,480.71
Amount expended for maintenance of way	8,444.88
Amount expended for station houses, other buildings and fixtures	301.01
Amount expended for motive power	3,295.93
Amount expended for cars, all kinds	.....
All other expenses not included in the above	6,048.96
Total	33,318.85

As to debts in 1886 (Rec. 169) this appears. "Debt. Funded debt—none. * * * Unfunded or floating debt —none."

If these solemn statements were true, there were no income bonds. Even had they been issued they were of no value.

The mortgage to the Farmers Loan & Trust Company of date January 1, 1883, covers the income by conveying (Rec. 149) with other property "the revenue, tolls, *incomes*, rents, issues and profits" of the railroad, and twice describes the bond secured (Rec. 146, 147) as the "*first* mortgage sinking fund bond." The granting clause (Rec. 148) of the mortgage is "grant, bargain, sell, assign, transfer and confirm." These words under the state statute (Rev. Sts. Mo. 1879, Sec. 675) make a warranty deed. This mortgage is signed and sealed (Rec. 153) by "Amos Tenney, secretary." So that Tenney, at that time a director (Rec. 236, 237) and a large stockholder (Rec. 129) in the Construction Company, in the most solemn way on January 1, 1883, before the road was constructed took part in the execution of a *first* mortgage on the property and *income*, warranting the title to the property. If this act of his, concurred in by the company, spoke truly, then his testimony as to outstanding income bonds was not true.

But this was not the only false statement made by Mr. Tenney. He solemnly stated (Rec. 233) that the Construc-

tion Compony surrendered the road to the trustees under the contract with Brooks of date November 1, 1879, that the trustees *accepted the surrender and subsequently made a deed* to the Railway Company. As to this the record shows its falsity in many respects. (1) Brooks never had any rights under the contract of November 1, 1879. The trustees had no knowledge of its existence. (Ev. Hanna Rec. 256. McLean 262.) The instrument (Rec. 241, 242) shows it was not signed by the trustees and was signed only by $7,500 in amount of interest by the subscribers of the original purchase money. The total amount of interest was $15,300. (Rec. 114, 116.) The contract provided that it was "to be of no effect unless signed by two-thirds of amount in ownership." (2) Hanna (Rec. 251) and McLean (Rec. 262, 265) testify most emphatically that there was neither a surrender to nor an acceptance of a surrender by the trustees. Bancroft, the other trustee, while not asked about a surrender, said (Rec. 284) the whole of the contract was in the writing of December 15, 1880. (3) *There never was a deed from the trustees to the Railway Company.*

Tenney also (Rec. 233) said that he sent Young to Kansas City to obtain the contract of December 15, 1880, because "the Construction Company's rights under all conveyances that they had, had been forfeited." A reading of the deeds demonstrates the falsity of this statement. There could have been no forfeiture under the conditions of the Brooks deed till July 1, 1881. (Deed Rec. 117.) He says (Rec. 234) Brooks was discharged and dismissed from the presidency by unanimous vote of the stockholders and directors. This Brooks denies (Rec. 204–206) and no record is produced by Tenney. He owned nearly half of the stock of, and was a director in the Construction Company. He said (Rec. 238 lines 32–36) that at the meeting when he claims Brooks was removed there were present

1395 shares of stock and that the entire capital was 1500 shares. The entire capital was in fact 2500 shares, of which Brooks owned 1175 shares, leaving but 1225 shares outstanding. (Art. Inc. Rec. 127.) As Brooks was not present (Ev. Brooks Rec. 206 Q. 11, 207 Q. 28, 208 Q. 45) it follows that Tenney was wrong about the number of shares present, as he was about the number of shares outstanding.

Tenney (Rec. 235) said he knew nothing of the contract with complainants when the contract of December 15, 1880, was made and then after fully detailing (Rec. 238, 239) the contract with Naylor & Co., his objection to carrying it out and that "it bankrupted the company," he added "It was in the early spring of 1880 when I first heard of the Naylor contract."

In view of the *many false statements by Tenney*, the absurdity of pledging the income alone before any work on construction was begun, the close relationship of the officers who conducted the deal, the suspicious circumstances existing in the case, *the failure of defendants to produce any papers or records* and the failure of the officers of defendants to testify, we submit that Tenney's statement as to the payment of income bonds is not sufficient foundation for a decree *especially when the answer disclams title under the deed*, and he as an officer signed another instrument pledging the income to the payment of *first* mortgage bonds, and as secretary keeping a record permitted a report to be filed declaring there was no such indebtedness. But these income bonds were as we shall see in the argument merely obligations of the company and under the Missouri Statutes were not sufficient to constitute a consideration.

2. *The Construction Company never abandoned the property as found by the trial judge.*

No such defense was pleaded. On the other hand the answer claimed title by mesne conveyances from Bancroft,

and not by abandonment. That probably is a sufficient answer to the suggestion. Moreover the contract of December 15, 1880, (Rec. 244-246) recited that the Railway Company had succeeded to the title of Brooks, *not by abandonment*, but by "mesne conveyances." This was a solemn recitation forbidding a claim of title otherwise. (*Carver v. Jackson*, 4 Peters. 1, 83.) The facts do not, however, warrant the suggestion, for if the learned judge meant by this finding that the Construction Company abandoned the property, leaving the way open for the acquisition of an independent title by the Railway Company, he misconceived the testimony. That the officers of the *two* companies being the same, attempted to turn the property from the Construction Company, which was burdened with an obligation calling for the payment of a large sum of money, to the Railway Company, is true. The abandonment was for no other purpose and in no other sense. Tenney says (Rec. 233) that the Construction Company held the title under the contract of November 1, 1879; that it surrendered the property to the trustees, who accepted the surrender and afterwards executed the instrument of December 15, 1880. This, as we shall presently see, is absolutely untrue. There never was any surrender. Tenney (Rec. 233) miscalled the instrument of December 15, 1880, a deed, and then undertakes to tell (Rec. 233) how it came to be executed, thus:

"Q. Why was this deed made to the Kansas City and Southern Railway Company by the trustees? A. I was, at and some months previous to that time, the secretary and managing director of the Kansas City and Southern Railway Company. I employed Mr. J. E. Young to go to Kansas City and see if he could make a purchase of the road after the surrender of the road to the trustees by the Construction Company. He finally concluded a contract and conveyance of the property to the Kansas City and Southern Railway Company on the terms and conditions set forth and provided in the deed which is Exhibit No. 2 in this deposition.

Q. Why did you send Young to get the deed from the

trustees when the Railway Company already had a deed from the Construction Company? A. The Construction Company's rights under all the conveyances that they had had been forfeited by their own terms, and Mr. Young had represented to me that *he had parties who would join him in a contract with the Railway Company to build a road* who were responsible and who would advance the money sufficient to secure the deed on the terms stated in Exhibit No. 2; *that contract he represented could be made was made and entered into between him and his friends under the name of Smith & Co. and the Kansas City and Southern Railway Co.*

Tenney had before said (Rec. 232) "The Construction Company employed J. E. Young as their chief engineer."

Again he speaks (Rec. 237) of Young as the engineer of the Railway Company, thus:

"Q. How much work had been done on the said Kansas City, Memphis and Mobile Railroad Co. before *your said Railway Company* took possession of it? A. I have no personal knowledge of how much work had been done except from the report of Mr. Young, *our engineer*."

Again he (Rec. 240) said:

"The Construction failed in the summer of 1880, early in the summer, but they kept one or two engineers to work during the summer months part of the time. Early in September of that year they gave up all hope of being able to comply with their contract with the trustees, and proposed to sell the road to the Railway Company. They abandoned their contract through instructions to Mr. Young, and he commenced negotiations under my instructions as financial agent of said Railway Company, and procured the deed of December, 1880, from the trustees."

Benjamin McLean, one of the trustees, in testifying (Rec. 269) about how the contract of December 15, 1880, came to be made, said:

"Q. Do you mean to tell me that the Kansas City and Southern Construction Company never asked for an extension of the terms of the Brooks deed? A. I could not tell

who asked. *They were so mixed up I did not know which was which.* I did not know one from the other. I could not tell who asked. *They were the same individuals representing both companies.*

"Q. Well, was Mr. Young—Mr. J. E. Young—an officer of the Construction Company? A. I don't know.

"Q. Don't you know, as a matter of fact, that he represented the Railway Company at the time of making the paper marked Exhibit B to his deposition? A. I think there was a man of that name; I know there was; but who he represented, and whether it was the Construction Company or the Kansas City and Southern Railway Company, or both, I don't know. *I think it was both.*" * * * *

"Q. I observe that in your cross-examination you do not distinguish very clearly between the Construction Company and the Railway Company. Please state whether you knew then or know now who represented the one company and who represented the other. A. Well, I don't definitely. *The same parties had come to me as representing both companies*, and we did not inquire who they were or who they represented." (Rec. 273.)

And as to what took place he (Rec. 271) said:

"*They wanted an extension of time*, and that is all I know distinctly. We told them that if they would put up the money we would grant the extension, and they did so."

John D. Bancroft (Rec. 284), speaking of the deed of September 18, 1880, said:

"Q. After the making of that deed the enterprise was in the hands of the Kansas City & Southern Railway Company, was it not? A. I suppose it was."

And referring to the contract of December 15, 1880, he (Rec. 285) said:

"If Brooks had any right, or the Southern Construction Company, *we were informed by Mr. Young, representing the Kansas City & Southern Railway Company, that the Southern Railway Company had those rights.* Therefore we did not feel that we were selling the property twice in that respect, if we made a contract with them before the first day of January, 1881."

He also (Rec. 287) said:

"Q. Who represented the Kansas City & Southern Railway Company in the negotiations which led to the execution of this paper of December 15, 1880? A. I think it was mostly J. E. Young. Some other officer may have talked with the trustees, but I think that most of these negotiations we conducted through Mr. Young.

"Q. Was anybody there during these negotiations representing the Kansas City & Southern Construction Company? A. I think not.

"Q. Mr. Brooks was not there? A. I think not.

"Q. Then this agreement of December 15, 1880, was made without any conference with or negotiations with the Kansas City & Southern Construction Company? A. The trustees were informed that the Kansas City & Southern Construction Company had parted with whatever interest they might or could have had, *transferring it over to the Kansas City & Southern Construction Company.*

"Q. And therefore you did not think it necessary to negotiate at all with the Kansas City & Southern Construction Company? A. We were informed that they had no further interest in it.

"Q. You were informed, were you not, that their interest had passed to the Kansas City & Southern Railway Company, and that it was only necessary to deal with the latter company? A. If they had any interest in it, whatever it might be, we were informed that the Kansas City & Southern Railway Company now owned it. It is so recited in the new contract."

It surely will never be declared by a court of equity that a corporation, which cannot voluntarily convey so as to defeat the just claims of its creditors, may indirectly accomplish the same result by abandoning property so that a new company, formed and controlled by the same persons who were officers of the debtor, may take the property freed from the debts of the old company.

3. *There was no serious dispute as to an alleged surrender as at least intimated by the trial judge.*

The answer (Rec. 27) claimed title *not by surrender* but

by mesne conveyances through Bancroft. No such defense as title by surrender was pleaded. The contract of December 15, 1880, solemnly asserted that the Railway Company had succeeded to the title of Brooks by mesne conveyances and not by surrender. This estopped the Railway Company from otherwise claiming (*Carver v. Jackson*, 4 Peters 1, 83). The suggestion as to a surrender came alone from and was entirely based on a statement by the witness Tenney. He attached as Exhibit "1" to his deposition the contract of November 1, 1879 (Rec. 243), and then testified:

"Q. I'll ask you to identify the paper which you now hold and which is marked "Exhibit No. 1" to your deposition? A. This is a copy of the original contract made between the owners of the property and James I. Brooks for the purchase of the Kansas City, Memphis & Mobile Railroad (Rec. 231). * * Q. Now state what was done with the original of that contract; that is, was the original assigned to any person; if so, state who? A. A construction company was formed. The Kansas City & Southern Construction Company was organized under the laws of Connecticut and Mr. Brooks conveyed to that company by deed all rights he had under the original agreement of which No. 1 is a copy. Q. State what the Kansas City & Southern Construction Company did in reference to accepting the terms of the original contract, of which No. 1 is a copy? A. They accepted the deed subject to the original terms of the contract as stated in Exhibit No. 1." (Rec. 232.) * * * The Construction Company *had failed* and could not carry out the contract made with Brooks, which is *Exhibit No. 1 to this deposition. They had no assets.* * * * The road was then surrendered to the trustees under the terms of the contract, Exhibit No. 1: *I mean it was surrendered by the Construction Company. The trustees accepted the surrender and subsequently*, in the month of December, 1880, made a deed to the Kansas City & Southern Railway Company." (Rec. 232, 233.)

We have already seen that this contract had conditions entirely different from those in the deed to Brooks. A comparison of the instruments will show. (Contract 241, 242;

Deed 116–118.) It was made without the knowledge of the trustees (Ev. McLean, 264; Hanna, 256), was never signed by them and nothing was ever done thereunder. By its own terms it was "to be of no effect unless signed by two-thirds of amount in ownership." As but $7,500 (Rec. 241-242) out of a total of $15,300 (Rec. 114–116) signed, the contract was void, thus showing that Tenney was not only wrong, but absolutely reckless in his swearing. More than this, *no deed was ever made by the trustees to the Railway Company.* The witnesses were emphatic in contradicting Tenney's statement. Thus Hanna, one of the trustees (Rec. 257), said:

"Q. State whether or not the road was ever surrendered by the Construction Company under the terms of the preliminary agreement, copy of which is marked 'Exhibit C'? A. It was not, as I recollect it. I have no recollection of any such surrender."

"Q. State whether or not the trustees ever accepted any such surrender from the Construction Company, and if so, state when and how? A. I have no recollection of ever accepting such surrender."

McLean, another trustee (Rec. 262, 265), said:

"State whether or not the trustees ever accepted any such surrender from the Construction Company, and if so, when and how? A. No, sir; we never did and never intended to, to my knowledge." (Rec. 262.) * * * *

"Q. Now if there had been a surrender, you have no recollection of it at the present time? A. No, there was no surrender. I do remember that. (Rec. 265.)

Bancroft, the other trustee, substantially said (Rec. 284) the same:

"Q. The recitals in the contract of the trustees with the Kansas City & Southern Construction Company, dated December 15, 1880, are according to the facts as you remember them, are they? A. Yes, sir; I believe those are the exact facts."

There was no other testimony on the subject of the surrender.

4. *The conveyances were not, as found by the trial judge, in good faith.*

It is perfectly apparent that Brooks obtained this property for the Construction Company. He so testifies (Rec. 206), and his declaration of trust (Rec. 121) and deed to the Construction Company (Rec. 122) so show. The trustees recognized that a railroad was to be built, and in the conveyance to Brooks (Rec. 116-118) and modification thereof in favor of the Railway Company (Rec. 244-246) imposed conditions to that end, and this necessarily contemplated the formation of a railroad company. Bancroft, one of the trustees (Rec. 285, 286), said: "The object of the trustees was to get the road built." Brooks first obtained title on January 13, 1880. (Rec. 118.) The Construction Company was formed on February 16, 1880. (Rec. 127.) Afterwards Brooks filed for record a declaration (Rec. 121) that his title had been taken for the benefit of the Construction Company *to be formed*, and he (Rec. 206) testified: "The entire object of the formation of the Construction Company was to acquire this property and the completing and putting it in condition for a railroad." Now when the deed from the Construction Company to the *Railroad* Company, May 24, 1880, (Rec. 4-6) was made, it was still contemplated that it was a company *to be formed* by Brooks and his associates, for the deed provides that the consideration was stock in and bonds of the railroad company "*to be issued.*" As to this deed Tenney (Rec. 235) said:

"There never was any Kansas City & Southern Railroad Co. organized. That deed was made by Brooks and never was confirmed or anything done about it. *Brooks and others had talked about organizing such a corporation, but never did.*"

Fairly construed, this language means that Brooks made this conveyance for the company which was *to be organized.* The deed was to the Kansas City & Southern

Railroad Company. The Company *actually* organized was given nearly the same name. that is, Kansas City & Southern *Railway* Company and was evidently the company contemplated. The name was so nearly identical that when there is but one company the courts unite in saying that it would be considered as the same company. So in this case the parties so construed it, for it will be seen that the original bill (Rec. 1) named the defendant as the *Railroad* Company. The subpœna in chancery (Rec. 7) and the return of service (Rec. 7) so designated defendant. An appearance was entered in that name. (Rec. 7, 8.) A demurrer was filed (Rec. 8, 9) February 6, 1882, verified by Amos Tenney, treasurer of the Railway Company, entitling the cause with a similar designation of defendant. Repeatedly afterwards the same designation of defendant was made (Rec. 10, 11, 24), and it was never until after the filing of the answer that the court record suggested any difference and noted defendant as the Railway Company. (Rec. 32.)

The Construction Company on March 2, 1880, contracted with complainants, and by the terms of the contract became bound to pay for steel rails the sum of $255,000. (See Contract Rec. 198, 199.) On May 18, 1880, the Construction Company refused to accept the rails and authorized complainants to dispose of same (Rec. 199), because it had become embarrassed. Six days thereafter, on May 24, 1880, a deed was made to a new company *to be organized* (Ev. Tenney 235), and the sole property of the company was disposed of for stocks and bonds *"to be issued."* June 10, 1880, the new company was organized. Two days thereafter, June 12, 1880, the deed was recorded, *as if it had been held back until the organization of the company was completed.* The managing officer of the new company, Amos Tenney, held nearly half of the stock of the Construction Company and was a director in both companies. Trouble then ensued between Brooks and Tenney, and there was probably an effort by each to freeze the other out. Tenney

as a witness claimed the property for the Railway Company by virtue of the deed of September 10, 1880. Brooks in his answer (Rec. 41), and also in his testimony claimed the property for himself (Rec. 205, Q. 16, 17). Both claims are adverse to complainants. The Railway Company by its answer admitted that the expressed consideration in each deed was false and then disclaimed title under such deeds.

Tenney said Brooks was ousted (Ev. Tenney Rec. 234, lines 8-32, p. 238, lines 32-37.) Brooks emphatically denied this and claimed that a fraudulent but unsuccessful effort was made to remove him. (Ev. Brooks, p. 206, 207, 208, Q. 7-11, 27, 28, 33, 35, 40, 45.) Who told the truth no one can tell. *It is certain that the records were not produced*, while the relations of the Railway Company with the Construction Company were such that it could have produced these records. John O'Grady was assistant secretary and general solicitor of the Railway Company. (Rep. to R. R. Comr's Rec. 168.) He signed the answer as solicitor for that company [Rec. 31], and took part in the examination of nearly every witness. [Rec. 181, 186, 204, 206, 213, 220, 231, 264, 279, 280.] He also appeared in the attachment suit for both companies. [Rec. 133, 134.] The court below found that he was the representative of the Construction Company and directed that substituted service be made on him for the company. [Rec. 34, 35.] Tenney was a director in and holder of 1105 out of 2500 shares of the capital stock of the Construction Company. [Art. Inc. Rec. 127; Ev. Tenney, Rec. 237, line 1; p. 241, lines 9, 10.] Tenney was also secretary, director and manager of all the financial affairs of the Railway Company. [Ev. Tenney, Rec. 233, lines 20, 21; p. 234, lines 46-48; p. 235, lines 1-4; page 236, lines 45-47; p. 241, lines 9-10; Trust Deed, Rec. 153; Report to R. R. Comr's 155.] J. E. Young was chief engineer of the Construction Company and engineer of the Railway Company. [Ev. Tenney, Rec. 232, lines 30, 31; p. 237, lines 38-41.]

Young represented to Tenney that he had parties who would join him in a contract with the Railway Company to build the road. [Ev. Tenney, Rec. 233, lines 32-36.] Tenney, himself interested in both companies, then for the Railway Company employed Young, the engineer of both companies, "to go to Kansas City and see if he could make a purchase of the road." (Ev. Tenney, Rec. 233, lines 22-24.) Young came to Kansas City, and some persons, himself probably included, *claiming they represented both the Railway and Construction Companies*, applied to the trustees for an extension of time on the conditions for reversion in the Brooks deed (Ev. McLean Rec. 269, lines 8-21; p. 271, lines 28-30; p. 273, lines 8-10; Ev. Bancroft, p. 285, lines 24-29.) Thereupon the contract of date December 15, 1880, (Rec. 244-246) was obtained, under which $25,000 was to be paid. This was advanced by Young, the engineer of both companies, and his friends who, under the firm name of Smith & Co., took the contract to build the road. (Ev. Tenney Rec. 233, lines 36-38.) All these transactions were with a company which had failed (Ev. Tenney Rec. 232, lines 41, 42; p. 237, lines 28-30; p. 239, lines 29, 30) and resulted in appropriating all the property of the corporation (Bill, Rec. 17, par. 6, Ans. 30, lines 10-12; Ev. Brooks 204, 205, Q. 6, 7, 14, 15) which, as we shall see, was of large value. The contract of December 15, 1880, (Rec. 244-246) recited that the Railway Company claimed through mesne conveyances from Brooks. The only deed then of record as a basis of such claim was that of May 24, 1880, which everybody concedes was a fraud. The deed of September 18, 1880, confessedly *reciting a false consideration*, was concealed till July 23, 1884, and no explanation vouchsafed therefor, although since November 10, 1880, the complainant had been in court claiming by a bill in equity that the propety had been fraudulently appropriated in order to defeat creditors. Even after recording this deed the solicit-

ors who prepared the answer, and the president who verified it, would do no more than disclaim title under the false and fraudulent instrument. We do not believe that in a jurisdiction where the burden of explanation is shifted to a grantee when suspicious circumstances are shown (*Clements v. Moore*, 6 Wall. 299-315) this transaction will be upheld as made in good faith.

5. *The title of the Construction Company was not subject to speedy forfeiture as stated by the trial judge.*

The contrary was asserted by the learned trial judge. The conditions of forfeiture were in the deed of the trustees to Brooks (Rec. 117, 118). The conditions were as follows:

"Subject however to the following conditions: Said party of the second part is to build said railroad from Kansas City to Harrisonville or Belton, as said second party may elect, on or before January 1, 1881, so as to be ready for use as a railroad; and also to complete said railroad to the coal fields of Bates County to a point south of Butler, on or before July 1, 1881, so as to be ready for like use as aforesaid. *And if said second party shall fail to build said railroad to said coal fields as aforesaid, then the property so to be sold as aforesaid shall revert to said first party and reinvest in them the same as they now hold the same. Provided, however, that as soon as said second party shall expend the sum of fifty thousand dollars in the construction of a roadbed for said railroad, commencing at Kansas City and running southwardly, then the said provision shall become null and void and of no effect whatever;* and upon said expenditure being made in the building of the said railroad as aforesaid by said second party of said sum of fifty thousand dollars, then said trustees are to execute to said second party, or its assigns, an instrument in writing acknowledging the waiver and extinguishment of said forfeiture."

While there are several conditions the title was only to revert in case the road was not constructed to the coal fields of Bates County by July 1, 1881, and should not revert in such case if $50,000 was at any time prior thereto expended

in construction. So that in May 24, 1880, and September 18, 1880, when the deeds were made, and on December 15, 1880, when the conditions were changed, there was ample time to save a forfeiture.

6. *Value of the interest of the Construction Company.*

The trial judge intimated that the property was not valuable. The testimony on this subject was undisputed. William C. Burke [Rec. 212, 213], a civil engineer, in July, 1888, made a careful measurement of all the stone work, etc., from Clinton to Osceola. He found on that part of the line 2,543.4 cubic yards of bridge masonry, 2,563.7 cubic yards of culvert masonry and 76,822 feet, board measure, timber in trestles and cattle guards. The testimony of Frank S. Ware [Rec. 213, 214] and William Miller [Rec. 216, 220] clearly shows that all the masonry had been built prior to the time when the Kansas City & Southern Railway Company took possession. The testimony of Burke [Rec. 212, 213] shows the value of the masonry upon the part of the line from Osceola to Clinton to have been 2,573.4 cubic yards at $10.50, $27,020.70, and 2,563.7 cubic yards at $5.50, $14,100.35, making a total of $41,121.05. To this must be added (in order to find the value that part of the road between Osceola and Clinton) the value of the grade itself independent of the masonry. The witness J. B. Colt [Rec. 252, 254] constructed about 20 miles of said grade, the whole distance being 30 miles. He received from his work from $75,000 to $80,000. He estimates that one-third of the grade had washed away or been wasted at the time it was taken by the Railway Company. Assuming this to be so, it was still worth at least $50,000, which added to the value of the masonry, would make the total value of that part of that part of the line at the time it was appropriated by the Railway Company over $90,000. To this must be added the fair value of the remainder of the

road-bed, masonry, etc., that is between Clinton and Kansas City, and the track, etc., at the Kansas City end of the line. The value of this was large. This is shown by William Miller (Rec. 216–220), who was one of the engineers employed in the original constrnction of the line, and who, shortly before testifying, went over and examined it. He estimated the value of the whole line at the time it came into the hands of the Kansas City & Southern Railway Company at $319,700. It is enough for our present purposes to say that the testimony makes it abundantly clear that the defendant Railway Company appropriated to its own use the property in question, and that it was of greater value than the complainants' judgment, to-wit, $35,901.39, with interest and costs. Tenney says (Rec. 235) that the deed of May 24, 1880, was made with the idea of forming a corporation to take the property. That deed was to the *Railroad* Company (Rec. 20). The *Railway* Company was incorporated June 10, 1880. Two days thereafter this deed of May 24, 1880, was recorded *as if the Company intended to be organized to receive the deed had been organized.* The purported consideration was $300,000 of the capital stock of the new company and $300,000 of the mortgage bonds of the same company. (Rec. 20.) If, then, there was *good faith* exercised the property was of great value. The deed of September 18, 1880 (Rec. 21–22), recited a consideration of $250,000. If there was *good faith*, then the property was valuable. In addition to the road-bed there was 30 or 40 deeds for right of way. (Ev. Brooks, Rec. 208, Q. 46, 48; Rec. 209, Q. 66; Rec. 210, Q. 70–74.) These, of course, were valuable. We have stated more than was probably necessary as to the value of the property, since the defendant below made no effort whatever in the way of a showing as to value.

7. *There was equity in complainants' demand.*

The trial judge stated to the contrary, but conceded that complainants had a just demand. This claim had at-

tached to it the same equities that exist in favor of all just unsecured debts of an insolvent company. That equity was that the corporate property was a trust fund for the payment of the debts, and could not be diverted at the direction of its chief stockholder and its chief engineer to another corporation of which they were chief officers, and for the benefit of a firm of contractors of which the engineer was a member.

Complainants on March 2, 1880, entered into a contract for the supply of steel rails. They went on the market in good faith, and purchased the rails to comply with this contract. The company failed, and they were left with the rails on hand and a declining market. They then sold them to the best advantage (Ev. Schlesinger, Rec. 181-198, contract p. 199.) They obtained judgment for the exact amount due in accordance with the forms of law, and in an action to which the Railway Company was a party.

The appellants here make this

ASSIGNMENT OF ERRORS.

1. The court below erred in its decree of October 7, 1887, (Rec. 58, 59) dismissing the bill.

2. The court erred in refusing a decree subjecting the railway property of the defendant the Kansas City and Southern Railway Company to the payment of complainants' demands and judgment.

APPELLANTS' ARGUMENT.

I.

The property in question belonged to the Construction Company, which was insolvent, and was taken and appropriated by the Railway Company.

The following facts are undisputed: The property in question was all that the Construction Company owned and exceeded in value the amount of a debt due complainants. While so indebted this property was turned over to and appropriated by the Railway Company while that debt was in existence and the Construction Company insolvent. It goes without saying that neither an individual nor a corporation can defeat the claims of creditors in so doing, unless there was sufficient consideration, and even then, the transaction must have been in good faith and free from fraud.

II.

The Railway Company cannot claim that there was a consideration for the alleged transfer from the Construction Company, because it is estopped by its pleading from so doing.

1. *How title was obtained.*

From what has already been stated it will be observed that the only attempt at a transfer of the title from the Construction Company to the Railway Company was by the deeds of May 24, 1880, and September 18, 1880. No other deeds or writings were made by the Construction Company, and the Railway Company upon this record must be said to have taken the title by these deeds or not

at all. We have seen the contract of Dec. 15, 1880, between the trustees and the Railway Company (Rec. 244) recited that the latter had succeeded to the title of Brooks by "mesne conveyances." The answer of the Railway Company declares (Rec. 27, lines 19–24) that it succeeded to the title by "mesneconveyances" through Bancroft. The recitation in the contract conclusively establishes that all the title which the Railway Company had was by "mesne conveyances" from Brooks. This is settled by the opinion of Mr. Justice STOREY in *Carver v. Jackson*, 4 Peters, 1, 83, 86, where he said:

"We are of opinion, not only that the recital of the lease in the deed of marriage settlement was evidence between these parties of the original existence of the lease, but that it was conclusive evidence between these parties of that original existence, and superseded the necessity of introducing any other evidence to establish it. The reasons upon which this opinion is founded will now be briefly expounded. To what extent, and between what parties, the recital of a lease in a deed of release (for we need not go into the consideration of recitals generally) is evidence, is a matter not laid down with much accuracy or precision in some of the elementary treatises on the subject of evidence. It is laid down generally, that a recital of one deed in another binds the parties and those who claim under them. * * * * The recital of the lease in the present release, works on the interest in the land; the lease gave an interest in the land, and the admission of it in the release enabled the latter to operate in the manner which the parties intended. The estoppel therefore worked on the interest in the land, not by implication merely, but directly by the admission of the parties. That admission was a muniment of the title and as an estoppel traveled with the title into whosoever hands it might afterwards come."

As the only "mesne conveyances" by which the Railway Company could on December 15, 1880, have claimed under were those in question, it should be taken as established that the title rests thereon.

2. *Admissions in answer.*

The bills charged these deeds to have been without consideration. The answer (Rec. 27, 29,) of the Railway Company and of Brooks (Rec. 40–42) expressly admit that both of these deeds were without any consideration. The answer of the Railway Company *disclaims* title under either deed. When the effect of these solemn admissions is understood, as it was not below, the court will see that the opinion of the learned judge who tried the case was based on a misconception of the record. The effect was, when we look to substance and not to form, a *disclaimer and an answer*, and in such case all intendments are taken in favor of the disclaimer. Thus in Story's Equity Pleading (10th Ed.) Sec. 839, it is stated:

"And if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer."

We submit that these admissions were binding on the company making them as an estoppel, and dispensed with the necessity of making any proofs. Let us see what the books say as to the effect of such admissions. In *Clements v. Moore*, 6 Wal., 299, 315, Mr. Justice Swayne said:

"It is an established rule of evidence in equity, that where an answer which is put in issue admits a fact, and insists upon a distinct fact by way of avoidance, *the fact admitted is established*, but the fact insisted upon must be proved; *otherwise the admission stands as if the fact in avoidance had not been averred.*"

In *Pope v. Allis*, 115 U. S. 363, 370, Mr. Justice Woods, speaking of such admissions when offered as evidence in another suit, thus:

"When a bill or answer in equity or a pleading in an action at law is sworn to by the party, it is competent evidence against him in another suit as a solemn admission by him of the truth of the facts stated."

Here, however, the case is stronger, for the admission is in the pleadings upon which this cause was tried.

In 1 Greenleaf on Evidence (Redf. Ed.) Sec. 27, it is said:

"In addition to estoppels by deed, there are two classes of *admissions* which fall under this head of conclusive presumptions of law; namely, *solemn admissions* or admissions *in judico*, which have been solemnly made in the course of judicial proceedings, either expressly and as a substitute for proof of the fact, or tacitly by pleading, and *unsolemn admissions*, *extra judicum*, which have been *acted upon*, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied without a breach of good faith."

In 2 *Herman on Estoppel*, Sec. 817, it is said:

"The effect of such admission or confession concludes the party, even though the jury should go out of the issue and find the contrary of what is thus confessed on the record. * * * * * All representations, averments and allegations in pleadings, made by the parties, are conclusive; that is, they are estopped to aver to the contrary."

At Sec. 818:

"The question which usually arises with respect to admissions in pleadings relate to their effect in the same suit, and it may be stated broadly that whenever a material averment, well pleaded, is passed over by the adverse party without denial, whether it be by pleading in confession and avoidance, or by traversing some other matter, or by demurring in law, or by suffering judgment to go by default, it is thereby for the purpose of pleading, if not for the purpose of trial before the jury, conclusively admitted. So any confession or admission made in pleading in a court of record, whether it be express or implied from pleading over without traverse, will forever preclude the party from afterwards contesting the same fact in any subsequent suit with his adversary. *The admissions made by*

either of the parties, whether in direct terms or by failure to traverse material allegations when called upon to do so, are as conclusive and as available as a bar as if they were proved by witnesses."

At Sec. 820:

"The rule that a party may be estopped by admissions on his pleadings, applies to all the parties to a cause. *Thus a defendant setting up in an answer in a legal proceeding a disclaimer of title estops him from denying the plaintiff's title.* A judicial admission by a party in one suit with regard to the nature of a contract estops him from introducing evidence in a subsequent suit to show that the contract was of a different nature."

In *Paige v. Willet*, 38 N. Y. 28, 31, it was said:

"Such admissions are conclusive upon the parties litigant and upon the court, and no countervailing evidence can properly be received, *or, if it is, either through inadvertence or tacit consent foisted into the case, it is entitled to no consideration.* * * * * * * For a still stronger reason a party who formally and explicitly admits by his pleading that which establishes the plaintiff's right, will not be suffered to deny its existence, nor to prove any state of facts inconsistent with that admission. No application was made to the court to be relieved from the effect of this admission or to weaken or modify its full import; and while it thus stood, in the language of Woodruff, J., in *Robins v. Codman* (4 E. D. Smith, 325) 'after such an admission it was not necessary for the plaintiffs to prove it, nor would it be permitted to the defendant to deny it.'"

If we are right as to our conception of the force of the pleadings, the only way for the defendant to have escaped, would have been to have proven, as alleged in the answer, a title by "*mesne conveyances*" from Bancroft outside and independent of the deeds in question. No claim of title by "surrender" or "abandonment" was pleaded and neither question was in the case. We therefore submit that when the court reads the answer and looks at the

chain of title disclosed by the conveyances, the complainants, as creditors, must be conceded a decree. Anything less permits a party to plead one state of facts and recover in direct antagonism thereto. As said in Bigelow on Estoppel (5th Ed.) 717:

"If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law available only between those who consented to its exercise would be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts and consistency of proceeding is therefore required of all those who come, or are brought before them."

III.

But there was no consideration in fact paid for the transfer.

This subject has already been dealt with in our statement of facts and especially in review of the opinion below.

The answer expressly admits that the consideration was not paid for either deed. Even the witnesses do not deny that the consideration for the deed of May 24. 1880, was not paid. Tenney expressly admits this fact, and concedes that the *expressed* consideration in the deed of September 18, 1880, was not paid. The whole contention as to a payment of a consideration rests upon the unsupported statement of Tenney as a witness that $100,000 in income bonds were given for the deed. He made so many false statements as to other matters that his testimony in this regard should not be taken as true. He, as secretary, executed a mortgage on the *income* to secure first mortgage bonds, and in this mortgage the Railway Company warranted the title. At a time when he was secretary, and necessarily custodian of the records, a sworn report was

filed with the Railroad Commissioners declaring that there was no indebtedness other than the *first* mortgage bonds issued in 1883. More than this, no explanation was made by any official connected with the company at the time of the trial. The solicitors who prepared the answer, and the president who verified the same, made no pretense that the deed of September 18, 1880, had a consideration, but averred to the contrary and disclaimed title thereunder. These records disprove Tenney's unsupported statements. More than this, they constitute an estoppel by record if there is any such doctrine. If the expense of this litigation can be invited by such records, and a party be permitted to avail himself of a statement of a witness to the contrary, then are plain principles of law set aside and overridden.

IV.

But even if income bonds had been given for the deed of September 18, 1880, there would not have been a consideration.

Had the answer claimed under the deed of September 18, 1880, and asserted a consideration therefor (which it did not) and should Tenney's statement as to the income bonds be accepted as true, still there could not be said to have existed a proper consideration. The income bonds have never since been heard of. There is no pretense that they have ever been paid, nothing to show whether negotiable or not and no legal testimony that the Construction Company does not still hold them. Even Tenney admits that no interest was paid thereon. They were at most mere obligations of the Railway Company, and no grantee can avail himself of a title acquired against the rights of the creditors of the grantor until *he has paid the consideration. Giving obligations to pay is insufficient.*

1. *The income bonds.*

Such bonds constitute no lien upon the property or income of the company, and such income may be pledged or appropriated by a subsequent mortgage without the consent, and even against the protest, of the holders of the bonds. In Jones on Corporate Bonds and Mortgages, (2nd Ed.) Sec. 234, it is said.

"The issuing of income bonds for the payment of the interest and principal of which the income of a railroad company is specifically pledged does not debar the company of the legal right to execute a mortgage of its road and property to secure the payment of other bonds. The pledge of the income is binding upon the company, but is no incumbrance upon the property itself, which under subsequent mortgage, may be taken out of the possession of the company and applied to the payment of the mortgage debt."

Perkins v. Deptford, 18 Sim. 277, 281, and *Garrett v. May*, 19 Md. 177, sustain this doctrine.

It follows that by the receipt of income bonds, the Railway Company at most gave for the property *its promise to pay.*

2. *Promise to pay insufficient.*

The fact that there was given an obligation to pay is insufficient. The consideration, and all of it, must have been actually paid; an obligation to pay is not sufficient, because the maker thereof can defend against it when creditors of the grantor seize the property. The validity of the conveyance is to be determined by the state statutes (Rev. Stat. Mo. 1879, 2497 and 2502 set out in appendix). These statutes have been constantly so construed. (*Paul v. Fulton*, 25 Mo. 163; *Arnhold v. Hartwig*, 73 Mo. 485, 488; *Dougherty v. Cooper*, 77 Mo. 528, 534, 535; *Young v. Keller*, 94 Mo. 581, 590, 591.) We can best give a doctrine of the cases by quoting therefrom.

In *Paul v. Fulton*, 25 Mo. 163, the court said:

"It is held in this country and in England that actual payment is in general necessary to the character of a purchaser for valuable consideration, and *that giving security or executing an obligation for payment will not be sufficient.* Payments in bills or notes of third persons will, however, be equivalent in most cases to actual payment; and the same effect would seem to be due to payment in the notes of the purchaser, if negotiable in their character and *actually negotiated so as to render him liable to pay them at all events.*"

In *Young v. Kellar*, 94 Mo. 581, 591, 592, it was said:

"Our statute touching fraudulent conveyances levels its denunciations against all transfers of goods 'within the intent to hinder, delay or defraud creditors,' and declares that all such transfers as against creditors 'to be clearly and utterly void.' The only refuge a vendee has from the denunciations of this statute is, that in good faith he has bought and paid the purchase money prior to notice of the fraud. In a word, he cannot play the role of an innocent purchaser while he remains in a situation to pay the money at will or to retain it at pleasure."

It needs no argument to show that a construction of a state statute by the highest court of the state is binding here.

V.

If, however, there had been a consideration for the deed of September 18, 1880, it was a void instrument.

The state statutes (Rev. Stat. Mo., 1879, Secs. 672, 743, set out in appendix) in express terms declare that a corporate deed to be valid must be executed by the president or presiding member. It is not the case of an individual, but the act of a corporation, which is subject of a review. In such case the deed must be pursuant to stat-

ute or else it is void. In 1 Devlin on Deeds, Sec, 340, it is said:

"But where it is provided that conveyances shall be made in a certain mode, or executed by certain officers, this must be done to make the instrument operative. Thus, if the charter of a corporation provides that a specified number of the directors shall be present at the making of a contract, a deed or contract executed in the absence of that number would not be valid; but the ministerial act of affixing the seal may be done by a less number. A like rule prevails where it is provided by statute that a conveyance or mortgage by a corporation shall be executed by its president. *The statute must be followed, and a deed or conveyance not executed in compliance therewith is not the deed of the corporation.*"

Besides the cases cited by this author, we may refer to *Galloway v. Hamilton*, 68 Wis. 652, 655, 656.

This suggestion comes with especial force when we remember that Brooks claimed, both in his answer and testimony, that the deed was a fraud and the officers participating in its execution did so without authority.

VI.

If, however, there was a consideration, the deed of September, 18, 1880, was a fraud and not made in good faith.

The rule of this court was by Mr. Justice Swayne, in *Clements v. Moore*, 6 Wal. 299, 315, stated to be that when the facts disclosed create a strong doubt of the integrity of the transaction, then the duty of making full explanation falls upon the parties to the transaction and the burden of proof rests there, with all doubts resolved against the sale.

The rule in the jurisdiction where this transaction took place is that any relation "generating confidence and consequent intimacies," shifts the burden (*Leavitt v. La-*

Force, 71 Mo. 353, 354), and that the failure of a grantee to testify or produce as witness his grantor when the bill charges the transaction to have been fraudulent, raises a presumption against its validity. (*Baldwin v. Whitcomb*, 71 Mo. 651, 658.)

The facts disclosed not only come within all these rules, but irresistibly lead to the conclusion that the transaction was fraudulent. What are these facts which have already been stated with references to the record? Briefly repeated they are:

1. On May 24, 1880, a fraudulent deed was made, reciting a false consideration, and although none was paid, two days after its incorporation the Railway Company appropriated and caused it to be recorded. 2. At this time the debtor was deeply involved and unable to meet its obligations. 3. September 18, 1880, the deed in question was executed, confessedly reciting a false consideration. It was concealed from record until July 23, 1884, although since November 10, 1881, there had been a bill on file charging a fraudulent appropriation of the property under the deed of May 24, 1880. No explanation was ever offered as to the cause of the concealment. 4. The deed of September 18, 1880, was executed out of the ordinary course by an agent, which was contrary to statute. 5. The validity of the deed and authority to execute it was denied by Brooks, who held 1175 out of a total of 2500 shares of stock in the Construction Company, yet no record was produced. 6. If income bonds constituted the consideration, no explanation was ever offered why, in 1883, the income was mortgaged to secure first mortgage bonds, and in 1884 and 1887 reports made to the Railroad Commissioners reciting that there was no such indebtedness. 7. Income bonds, if given, were worthless, as the road was not constructed until after 1883; and anyhow they were, as we have seen, mere obligations of company,

and *there is no pretense whatsoever that the Railway Company ever paid them. Tenney says that no interest was ever paid. The result is that the Railway Company obtained the property without paying anything in cash.* 8. The relations between the parties were most intimate. John O'Grady, as a legal representative, appeared for both parties. Tenney, who conducted the entire transaction, owned nearly half the stock and was a director of the Construction Company, and he was secretary, director and managing agent of the Railway Company. J. E. Young was the engineer of both companies, and formed with his friends a partnership under the firm name of "Smith & Co.," to make a contract to build the road." The arrangement of date December 15, 1880, was made and the title was put in the Railway Company so that contract to the advantage of Young could be made. 9. The answer prepared under the direction of counsel and verified by the president, admitted that there was no consideration for the deeds from the Construction Company and disclaimed title thereunder. No representative of the company explained the inconsistency of such averment with the claim that the consideration was income bonds.

The corporate property of the insolvent Construction Company is in equity regarded as a trust fund for the creditors. This doctrine has been often asserted. 2 Morawetz on Private Corporations, 2d Ed., Secs. 780, 781, 784, 787, 789 and 790; *Drury v. Cross*, 7 Wall. 299; *Railroad Co. v. Howard*, 7 Wall. 392; *Jackson v. Ludeling*, 21 Wall. 616; *Curran v. Arkansas*, 15 How. 304; *Wabash, etc., Ry. Co. v. Ham*, 114 U. S. 594; *Blair v. St. Louis H. & K. R. Co.*, 22 Fed. Rep. 36; *Union National Bank v. Douglass*, 1 McCrary 86; *Hibernian Ins. Co. v. St. Louis, etc., Trans. Co.*, 3 McCrary 368; *Brun v. Insurance Co.*, 16 Fed. Rep. 140.

In 2 Morawetz on Corporations, (2d Ed.) Sec. 780, it is said:

"In equity the fund contributed or agreed to be contributed by the shareholders, as capital for the purpose of carrying on the company's business and securing its creditors, is considered as a substitute for the general liability of the shareholders for obligations incurred in a corporate capacity. The fund so contributed or agreed to be contributed is treated in equity as a trust fund charged with the payment of the corporate debts. This charge or equitable lien in favor of creditors adheres to the capital of a corporation after the company has been dissolved and deprived of its franchises; and although the legal remedies of creditors are lost under these circumstances, their right to have the benefit of the fund which the shareholders have contributed or become liable to contribute for their security will be protected."

And again at Sec. 781:

"Every person who becomes a shareholder in a corporation, and every person who deals with a corporation, understands that the fund contributed or agreed to be contributed as the company's capital *shall be charged with the payment of corporate debts.* It is likewise understood, where there is no express provision to the contrary, that the fund so charged shall be the only security of creditors, and that the shareholders shall not be individually liable for the corporate debts and obligations."

Again in Section 784:

"The rights of creditors of a corporation in relation to the company's capital are of a purely equitable character, and may, therefore, in all cases, be moulded according to the requirements of justice."

So in Section 787:

"A corporation which has voluntarily ceased to carry on business, or whose right to use the corporation funds for business purposes has expired, continues to hold its assets subject to the equitable claims of its creditors. If the company's assets have been reduced so that no surplus

would remain after paying its creditors, it is apparent that its shareholders would have no further interest in the assets remaining; *their* equitable rights upon the corporate property would be wholly superseded by the equitable rights of the creditors. The equitable claim of creditors would be fixed upon *all* the company's assests, as an equitable charge or lien.

The *legal* ownership of the assets of a corporation is not altered by the company's insolvency, and the regular agents of the company would still have the power of representing it, and managing its property for all authorized purposes. *But the equitable interests of the shareholders and creditors are altered by the insolvancy;* and the directors or managing agents, who originally stood in a fiduciary relation to the company, become placed in a fiduciary relation to its creditors. The powers of management vested in the directors of an insolvent corporation which has ceased to carry on business, *are solely powers to manage the assets in trust for its creditors and for their benefit.*"

Jackson vs. Ludeling, 21 Wal. 216, establishes the doctrine that the officers and managers of corporations are trustees alike for stockholders and creditors, and have no right to enter into or participate in any combination, the object of which is to divest the company of its property and obtain it for themselves at a sacrifice, and it is distinctly declared that, on the contrary, "in case of em-"barrassment to the company, and any necessity to sell the "estates of the company, it is their duty to the extent of "their power to secure for all those whose interests are in "their charge, *the highest possible price for the property "which can be obtained for it.*"

The doctrine for which we contend is strongly stated in *Curran vs. State of Arkansas*, 15 How. 304, 307, by Mr. Justice CURTIS, thus:

"The plaintiff is a creditor of an insolvent banking corporation. The assets of such a corporation are a fund for the payment of its debts. If they are held by the cor-

poration itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of other than *bona fide* creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts. This has been often decided and rests upon plain principles."

And to the same effect is the opinion of Mr. Justice GRAY in *Wabash, etc., Ry. Co. vs. Ham*, 114 U. S. 594.

Equally strong language will be found in the other cases cited, but the doctrine is so well settled by authority and so abundantly supported by considerations of reason and common justice that we abstain from further quotations. It is reasonably certain that the Railway Company was not a *bona fide* purchaser of the property. To constitute a *bona fide* purchaser it must appear (1), that the purchase was for value paid, (2), that it was without notice and (3) that it was in good faith. We have already shown that the purchase was not for value, because the pretended consideration (income bonds) were never given, but if given were worthless and have never been paid. It is undisputed that the Construction Company was insolvent that it was selling all of its property, and that it was doing this in such a way as to injure its creditors. Of all these facts the defendant Railway Company had notice. Let it be noted in the first place that the Railway Company, being a corporation, must be held to have had notice of such facts as were brought home to its officers and agents engaged in the transaction in question. (2 Pomeroy's Eq. Jur. Secs, 666, 667 and numerous cases cited in note 1 to latter section,) And it matters not whether the notice to the officer or agent is, in such a case, actual or constructive, for in either case the principal is bound, and it is enough that the officer or agent was aware

of such facts as should have put him upon inquiry, and thus led to a discovery of the actual facts. (Ibid 669.)

Beyond all this we have shown by our statement that the active agents in the negotiation of this transfer were Tenney and Young, and that they were officers of both seller and buyer; that, unquestionably the transaction was one which sacrificed the rights of the creditors of the Construction Company; this for the plain reason that it was an attempt to deprive that company of its tangible and valuable property out of which its creditors could have enforced payment of their claims, and to substitute in lieu thereof nothing unless we give credence to Tenney's statement, and then only income bonds of the Railway Co., which have never been paid, and if still outstanding will never be of any value. That such a transaction is fraudulent and void is established by the uniform decisions of the courts of this country and England, and is no longer open to dispute. 2 Morawetz on Private Corporations, Secs. 517–521; Wood's Railway Law, pages 366, *et seq.*; *Butts v. Wood*, 37 N. Y. 317; *Hoyle v. Ry. Co.*, 54 N. Y., 314, 328; *Bliss v. Matteson*, 45 N. Y. 22; *Flint v. R. R. Co.*, 14 Mich. 477; *Koehler v. Black R. Falls Iron Co.*, 2 Black, 715, 721; *Wardell v. U. P. Ry. Co.*, 103 U. S., 651, 658; *Pearson v. Concord R. R.*, 13 Am. and Eng. R. R. Cases, 102, 120.

The doctrine established by these cases is that the directors and officers of a corporation are to be regarded as trustees and agents; that they have no authority to represent the corporation in transaction with another corporation in which they are interested as shareholders or otherwise; that they must exercise all their powers to advance the interests of the corporation of which they are officers or agents and for no other purpose; that they have no right under any circumstances to use their official positions for their own benefit, or the benefit of any one except

the corporation itself; that they cannot bind the corporation by any contract or in any transaction with third persons in which they have a private interest at stake; that if they have a private interest both as seller and as buyer, a sale negotiated by them will be regarded as fraudulent and void, and finally, that it is not even necessary to show fraud in order to set aside transactions negotiated by interested directors or agents. Upon this subject we direct especial attention to *Michoudv . Girod*, 4 Howard, 503, 551, and numerous other cases cited by the Supreme Court of New Hampshire, in *Pearson v. Concord R. R., supra.*

Said Mr. Justice Field in delivering the opinion of this court in *Wardell v. R. R. Co.*, 103 U. S., 651, 658, and in speaking of a case where directors of a corporation sought to represent both seller and buyer:

"The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and constituted as humanity is, in the majority of cases duty would be overborne in the struggle."

The doctrine precisely applicable here is thus stated in 2 Morawetz on Corporations at Section 520:

"The rule disqualifying an agent from representing his principal in any transaction in which his personal interests are opposed to the interests of the principal, applies in all cases where there is danger that the agent may be induced to use his powers for his own advantage. It is immaterial what the character of the interest of the agent may be, provided it is a substantial one. *Thus, the directors of a corporation have no authority to represent it in transactions with another corporation in which they are shareholders, if their interest in the latter company might induce them to favor it at the expense of the company whose interests have been intrusted to their care.*"

VII.

There was no abandonment of the property by the Construction Company.

Mr. Justice BREWER, in disposing of the case, seems to have rested his views upon the idea that the Construction Company, for the consideration of $100,000, *abandoned* the property to the Railway Company. This view has no foundation in the testimony. It is a departure from the issues made by the answer, for that claims title by mesne conveyances from Bancroft, and not by abandonment.

VIII.

Power of the Construction Company to hold the property.

The answer averred that the Construction Company had no power to acquire the property in question. No stress was laid on this question by the court below, and there are two answers to the contention.

1. Only the State can raise the question of the power of the Construction Company to acquire and hold the property in question. This is so well settled as to require no argument. *Chambers v. St. Louis*, 29 Mo. 543; *Hovelman v. Kansas City*, 79 Mo. 639; *Shewalter v. Pirner*, 50 Mo. 218; 3 Washburn on Real Estate, 283; *Bogardus v. Trinity Church*, 4 Sandf. Chan. 758; *Humbert v. Trinity Church*, 24 Wend. 587, 604, 629; *Harpenning v. Dutch Church*, 16 Pet. 492, 493; 2 Morawetz on Private Corp., Sec. 710 and cases cited.

2. Even if the question could be raised here it will be found that the power given by the charter of the Construction Company (Rec. 127) to "buy, sell, own and "deal in any real estate or personal property necessary or "convenient for the prosecution of said business, and gen-"erally to do all things incidental to said business and to

"the proper management thereof," was amply sufficient to authorize the purchase in question. (Morawetz on Corporations, Secs. 321, 329, 678, 708, and cases cited in note 2 to Sec. 321; *National Bank v. Matthews*, 98 U. S. 621; *Beecher v. Rolling Mill Co.*, 45 Mich. 103; and see the numerous cases cited in note 1, 2 Morawetz on Corporations 2nd Ed. 680.)

IX.

Right to attach the property in question.

The answer averred as a defense that the property was not subject to attachment. The opinion below notices the question without deciding it.

1. It will be remembered that the attachments were levied in October, 1881. The bill in equity *in aid of the attachments* was a right expressly confined by the State Statute (Rev. Sts. Mo., 1879, Sec. 448, set out in appendix hereto). This is a statutory right which will be enforced in equity by the federal courts (*Clark v. Smith*, 13 Pet. 195; *Broderick's Will Case*, 21 Wal. 520; *Holland, Challen*, 110 W. S. 515.) In the attachment suit pursuant to a state statute (Rev. Sts. Mc. 1879, Sec. 449, set out in the appendix hereto) the Railway Company filed a statutory interplea, claiming the property because it was not subject to levy. The court in that case decided that question against the Railway Company, declaring that the attached property should be held by the judgment at law. We therefore submit that the question as to whether the property was *subject to levy was settled and decided in the law action.* But even if that were not so, still if the Railway Company does not lawfully own the property, the Construction Company, the only party interested in the question, filed no answer and makes no such defense.

2. But we submit that the property was subject to attachment, and there is no room for invoking a rule, if any such exists, that it is against public policy to sell a part of a railroad upon execution. Even that rule has no application whereas here the property was not in use as a railroad, but was merely a road-bed lying idle and unused. (1 Wade on Attachment, Sec. 262; *Boston Elec. R. Co. v. Gilmore*, 37 N. H. 410.) There is, however, no difficulty about this question when the state statutes (set out in appendix are considered) are carefully considered, and when it is remembered that all the road was levied on. In such case the rule as to selling a detached portion of a railroad has no application. That an attachment may be levied, a lien created, and a bill in equity filed under Sec. 448 is perfectly clear. (*Railroad Company v. James*, 6 Wal. 750; *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. Rep. 43, 57, 58.) Sec. 742 provides for an attachment against the property of foreign corporations the same as allowed against individuals. Sec. 753 provides for levy on the lands of a corporation; Secs. 416, 2354 for a levy on all the property of a debtor; Sec. 418 for writs of attachment to different counties; Sec. 420 for the method of service on real estate. If the property was real estate within the meaning of Sec. 416 the levy could be made. That it was real estate follows from the definitions given. (Secs. 700, 3126, 2356, 3124). This legislation is according to Sec. 9, Art., 12 of the constitution of 1875, providing that "Dues from private corporations shall be secured by such means as may be prescribed by law." Sec. 11 of the same article provides that the word "corporation" used in the article shall be construed to include all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships.

In the oral argument below counsel for defendants referred to Section 16 of this Article 12, which provides:

"The rolling stock and all other movable property belonging to any railroad company or corporation in this state shall be considered personal property and shall be liable to execution and sale in the same manner as the personal property of individuals; and the general assembly shall pass no law exempting any such property from execution and sale."

The point was made on this section 16 that by implication it exempted the real estate and particularly the right of way of railway companies from execution and sale. No such implication arises. If such implication results from the language of this section 16 as to a right of way, it results as to all other property of a railroad company, and it would follow that no other kind of property, real, personal or mixed, except the rolling stock and other movable property mentioned in the section could be taken in execution or sold. Such an inference is extreme and absurd.

This Section 16 of the Constitution was merely intended to change the rule prevailing in some states that rolling stock of a railroad was real estate and must be sold as such. The decisions on this point will be found collected in a note to Freeman on Executions (2d Ed.), 265. Rolling stock was real estate in Illinois. *Palmer v. Forbes*, 23 Ill. 301; *Hunt v. Bullock*, *Ib.* 320; *Titus v. Mabee*, 25 Ill. 257.

The provision in the Missouri Constitution was taken from that of Illinois. (Const. Ill. 1870, Art. X. §10.) This being so, the history and object of the provision is manifest.

There is no provision in Missouri statutes for sequestering the property, rents, issues or profits, tolls or receipts of any corporation. The only remedy given under the attachment law and various other attachments is to seize and sell the property of a delinquent corporation out and out. In some states under statute the franchises and property

of a corporation may be sold. (Railroad Companies Appeal, 70 Pa. 155.)

The theory of the Missouri statutes is that whenever a corporation has any property it may be sold on execution and seized in attachment. If the franchises are property of any kind there can be no doubt, on reading the constitution and statutes, that it can be sold on execution and seized in attachment. The mere franchise to be a corporation is probably not property within the meaning of these statutes. It is not necessary to discuss or decide in this case what franchises are property. The Construction Company, whose property is sought to be sold, became insolvent and quit business, and on the principle of justice and according to the language of the statute as to the attachments and executions, its property can and ought to be sold to pay its debts. The tendency of all the modern decisions is to hold the property of railroad companies liable for debts of the corporation the same as property of individuals. In this particular case all the property of the insolvent Construction Company was seized in attachment and ought to be sold on execution or charged in equity.

In *Stewart v. Jones*, 40 Mo. Rep. 141, it was said:

"The assets, goods, chattels and property of a corporation may be sold on execution so as to entirely arrest its usefulness and stop its operations, but the franchise is not a subject of sale and transfer unless the law by some positive provision has made it so, and pointed out the mode and method by which the sale and transfer may be effected."

The property sought to be disposed of in this case belonged to individuals as ordinary property until the same was conveyed to the defendant Construction Company. The conveyance to the defendant Construction Company was an ordinary conveyance, and did not in any way in expressed terms or by inference or implication make the property

subject to public use for any purpose. The defendant Construction Company never impressed on the property the element of appropriation for use for public purposes in any way. The Railway Company took possession of it and makes a claim to it as its owner distinctly and solely on the ground that it acquired title from the natural persons who owned it. There is no evidence to show any conveyance from such natural persons, nor is there any document which impresses on the property the dedication or setting apart of the same for any public use. The Railroad Company acquired title to it, if at all, which is denied in the ordinary way as it would acquire title to a locomotive or to a warehouse, or to a bond or note given to it for value. It is not for that company on the facts disclosed in this case to claim that it must hold this property in order to accomplish the purposes of its creation as a railroad company, and therefore that the property cannot be subjected to the payment of the debts of the Construction Company. It is the estate and interest of the Construction Company that is to be sold, and the extent of that estate and interest is to be determined in this case for the purpose of making title as against the Railway Company which claims the property. Another fact is important: We are not seeking to sell the right of way simply, but also the grade, bridges, masonry, etc., constituting a substantial interest in the real estate of the value of several hundred thousand dollars. This is most assuredly "property" within the meaning of the statutes of Missouri upon which we were authorized to levy our attachment, and upon which we have acquired a lien by such levy. And if we have thus acquired a lien, equity will afford relief by removing the cloud upon the title and decreeing a sale. There are cases in some of the states holding that a judgment creditor cannot sell a part of a line of railroad so as to segregate it from the remainder, and thus inter-

fere with the public interest and convenience. Those cases have no application here for many reasons, and, among them, for the reason that we are not seeking to sell a part but the whole of this railroad property.

3. Moreover, it is settled that even in cases where the levy is upon a portion only of an entire line, equity will afford relief by appointing a receiver, or by ordering the whole property sold intact. In this case there is a prayer for a receiver, and this form of relief would be granted even if it should be held that complainants cannot sell the property on execution. The fact that the property is of such a character as not to be subject to sale on execution would not, if it were true, render it entirely exempt from liability for the payment of the corporate debts. *Railroad Company v. James*, 6 Wal. 750; National Foundry & Pipe Works, 52 Fed. Rep. 43, 57, 58.

Covington Draw Bridge Co. v. Shepard, 21 How. 112, settles this point. There a judgment had been rendered against a bridge corporation which held no real estate, but only a franchise to operate a toll bridge. It was a mere easement, the court said, "the corporation not owning a fee in the land at either bank of the river, nor under the water," and therefore the court said it was "difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property."

Without deciding this question, however, the court went on to say :

"The question whether a railroad company's property, including the franchises, can be subejcted to the debts of the corporation by a decree in equity is treated very fully by Redfield on Railways, Chap. 32, Sec. 2, page 561; there the substance of the decisions affecting the doctrine is given in cases where there were liens by mortgage. The subject was well examined by the Supreme Court of Georgia in the case of the *Macon Western R. R. Co. v. Parker*, 9 Geo. R. 378. The consent there involved claims of creditors. When

speaking of the necessity of equity exercising jurisdiction the court say "that the whole history of equity jurisprudence does not present a case which made the inter position of its powers not only expedient, but so indespensably necessary in adjusting the rights of creditors to an insolvent estate as this did.' The road was sold according to the decree; but, to settle the difficulty as to the sale of a franchise without the cansent of the power granting it, upon application, an act was passed by the legislature, creating the purchaser and his associates a body corporate with powers and privileges of the old company. In England the practice is to order a receiver to be appointed to manage the corporate property, take the proceeds of the franchise and apply them to pay the creditors filing the bill."

And the court concluded thus:

"All that we are called to decide in this case is, that the court below had power to cause possession to be taken of the bridge; to appoint a receiver to collect tolls and pay them into court to the end of discharging the judgments at law; and our opinion is that the power to do so exists, and that it was properly exercised."

Baxter v. Turnpike Co. 10 Lea. 488 s. c. 4 A. & E. Cor. Cas. 134, was a case in which creditors recovered judgment against a turnpike company and caused executions to be levied upon the road-bed and chartered width of way, the toll gates, toll houses and lots and franchises of the company in the county of Davidson. The plaintiff was the purchaser of this property at sheriff's sale. Upon final hearing the Chancery Court below was of the opinion that the execution sales were void; that the company was insolvent at the date of the levy of the execution and that the property and franchises of the company should be sold as an entirety for the benefit of the creditors equally. The court said:

"The power of a court of chancery to impound the tolls of a corporation for the benefit of its creditors by the

appointment of a receiver is well settled: *Drawbridge Co. v. Shepherd*, 21 How. 112. And the jurisdiction to sell the entire property and franchises under a mortgage or other contract is equally well settled: *Clay v. East Tenn. & Va. R. Co.*, 6 Heis. 451. There has been a conflict of judicial opinion as to the power of the court to make such a sale for the benefit of creditors without the aid of a contract, but the conclusion reached in this State is in favor of the power: *Gleaves v. Turnpike Co.*, 4 Baxt. 83."

In *Curran v. Arkansas*, 16 How., 307-308, it is said:

"The plaintiff is a creditor of an insolvent banking corporation. The assets of such a corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of others than *bona fide* creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts. This has been often decided, and rests upon plain principles."

According to this the property of the Construction Company, which is now in controversy, was a fund for the payment of the debts of that company, and having gone into the hands of others than *bona fide* creditors or purchasers, leaving such debts unpaid, it is subject to be charged with the trust in favor of the creditors. The fact that the fraudulent purchaser happens to be a railroad company cannot change this principle nor prevent its application.

In 2 Redfield on Railways (5th Ed.), 514, it is said:

"We know that in cases where a joint stock company becomes insolvent, it is every day's practice for courts of equity to assume the control of the enterprise, and through

the agency of a receiver to conduct for a time the business."

It is now settled, at least so far as federal courts are concerned, that a creditor, *without first having obtained a judgment at law*, may go into a court of equity and set aside fraudulent conveyances of his debtor made for the purpose of hindering or delaying creditors, and subject the property to the payment of a debt due him. This rule is laid down by this court in *Case v. Beauregard*, 101 U. S. at pp. 690–691, where the court, after citing authorities in support of this proposition, said:

"The foundation upon which these, and many other similar cases, rests is that judgments and fruitless executions are not necessary to show that the creditor has no adequate legal remedy. When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal processes."

"But, without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property, for the debt due him, he may go into equity without exhausting legal processes or remedies."

It is then sufficient if the creditor has *either* a trust in his favor or a lien upon the property. It is not necessary that he should have both, and it is not necessary that he should have the lien.

These quotations might be multiplied, but it is not necessary. They are cited, not because we have any doubt whatever as to the soundness of our contention that the statute of Missouri authorizes the levy of an attachment, or of an execution upon the tangible property of the railroad company. They are cited merely out of an abundance of caution, and for the purpose of showing that there is a remedy in equity, even where there is no statute authorizing a levy upon and sale of railroad property.

If this were not so the consequences would be in deed surprising. Counsel for the defense have suggested no remedy whatever to which a creditor of a railroad company, having no mortgage or contract lien, may resort. It follows, therefore, that if they are right a railroad corporation may own property valued at millions of dollars and may defy its creditors. The mere statement of such a proposition is its sufficient refutation.

The complainants have a lien in equity upon the property of the Construction Company, their debtor, which a court of equity would enforce as against the claims of a fraudulent grantee, irrespective of the question whether the property is subject to attachment or execution at law or not. If neeessary to prevent an insolvent corporation from defrauding its creditors, who have reduced their claims to judgment, equity will appoint a receiver and through him will take possession of and administer the effects of the insolvent corporation in such way as to liquidate its debts as far as possible.

4. But if we should concede that the attachment created no lien, a creditor's bill would lie without exhausting the legal remedies. The Construction Company was a foreign corporation. If its property was not attachable there was no method of obtaining a personal jupgment. In such case a bill in equity can be filed without first ex. hausting the legal remedies. (*Pendleton v. Perkins*, 49 Mo. 565; *Hadden v. Spader*, 20 Johns. 554; *Reader v. Speake*, 4 S. Car. 293; *Frazer v. Western*, 1 Barb. Ch. 220.) The exception is as clear as the rule itself.

5. But it is not necessary to consider any of the foregoing suggestions for the reasons that prior to a trial of the equity cause the attachment suit ripened into a judgment. Without objection a supplemental bill was filed. The suit, when tried, was a creditor's bill upon a judgment at law. Whether this supplemental bill was subject

to objection is unnecessary to consider, for none was made The defendants could not go to trial as if the supplemental was proper, and then claim on appeal that the bill could not be maintained because complainants were not judgment creditors. As said by Chief Justice Packer, in *Slack v. Lyon*, 9 Pick, 65, the party "shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy."

The case then is simply this: If complainants had no lien on which to base their original complaint for relief, they did have the same when they obtained their final judgment. A supplemental bill showing the rendition was filed. To this no objection was taken by demurrer or plea. The record of the judgment was offered in evidence and no objection was made thereto. An objection that a supplemental bill states a case which accrued after the original bill was filed cannot be made for the first time in this court: (*Senft v. Manhattan R. Co.*, 14 N. Y., Supp. 876; *Gelatt v. Ridge*, (Mo.) 23 S. W. Rep. 882, 884; *Green v. Turner*, 36 Ark. 17.) This principle was substantially asserted in *Kilbourn v. Sutherland*, 130 U. S. 505, 514, and *Coburn v. Cedar Valley Land Co.*, 138 U. S. 196, 221.

In conclusion we respectfully submit that appellants are entitled to a decree subjecting the property of the defendant Railway Company to the payment of its judgment

Respectfully submitted.

WALLACE PRATT,
JEFFERSON BRUMBACK,
FRANK HAGERMAN,
For Appellants.

APPENDIX.

OPINION OF COURT BELOW.

BREWER, C. J: This is a suit in equity brought to charge certain property in the hands of the defendant Railway Company with the payment of a judgment in favor of complainants and against the defendant Construction Company. The property sought to be charged is the right of way, road-bed, masonry, etc., formerly belonging to the Kansas City, Memphis & Mobile Railway Company, and now in the possession and use of the defendant Railway Company. In the early part of 1876, the Kansas City, Memphis & Mobile Railway Company, which had constructed and then owned the property in question, was thrown into bankruptcy and the property conveyed to assignees in bankruptcy. At that time several miles of road had been graded and many thousands dollars expended in masonry and culverts. On April 25, 1877, the assignees in bankruptcy, in pursuance of orders of the court, sold and conveyed the property to John D. Bancroft for $15,025. The purchase was made for the benefit of a few gentlemen, merchants, and having business interests in Kansas City, who purchased not with a view of completing the road themselves or of speculation in the purchase, but to secure its construction and control in the interests of Kansas City.

On the 27th day of April, 1877, Bancroft conveyed the property to Thomas K. Hanna, Benjamin McLean and John D. Bancroft, as trustees for the parties interested the purchase. These gentlemen held the title until January 13, 1880, when they conveyed it to James I. Brooks for the cash consideration of $19,156.87, and upon certain terms and conditions. Mr. Brooks purchased for the defendant Construction Company, to which in a few days he conveyed the property. The conditions of the conveyance from the trustees and through which defendant Construction Company received title are these:

(Here follows copy of conditions of deed to Brooks found in record at pages 114–116.)

"On September 18, 1880, a conveyance of the property

was executed in the name of the defendant Construction Company to the defendant Railway Company, which deed, though attested by the secretary and seal of the company, was signed only by one Henry D. Ashley as agent of the Construction Company. The consideration expressed in this deed was two hundred and fifty thousand dollars. On December 15, 1880, this instrument was executed by the trustees and beneficiaries to the Railway Company."

(Here follows copy of contract of December 15, 1880, found in record at page 246.)

"After this the defendant Railway Company took possession of the property and has completed and in operation the line of railroad. On March 2, 1880, after the purchase by the defendant Construction Company it contracted with complainants for the purchase of five thousand tons of steel rails at fifty-one dollars per ton, on which contract it paid complainants $50,000. Little more than two months thereafter, on May 10, 1880, finding itself unable to complete the contract, the Construction Company authorized the complainants to sell the rails for its account without in any way prejudicing their claim for damages against the company. No rails were ever in fact delivered to or received by the Construction Company, but the price of rails having depreciated quite rapidly, the complainants sold them much below fifty-one dollars and presented a claim for damages above the fifty thousand dollars received, in the neighborhood of forty thousand dollars. Suit was commenced on this claim on October 7, 1881, writs of attachment issued and levied upon the property in question, and on February 1, 1886, complainants recovered judgment against the Construction Company for $35,901.39; and it is to enforce that judgment that this suit is brought.

The contention of complainants is that the deed signed by Henry D. Ashley was ineffectual to pass the title away from the defendant Construction Company, and therefore it still remains in the Construction Company and subject to this judgment; or, if it be true that the Construction Company did part with its title, that it was a conveyance in fraud of the rights of these complainants as creditors because it was a conveyance without consideration of all its

property. As a matter of fact, this was all the property the Construction Company had, and the judgment rendered shows that it was in debt to complainants; so that in this respect the questions presented are whether the Construction Company has conveyed away its title, and if so, whether the transaction is void as against the complainants.

That the Construction Company has parted with its title I have little doubt. Whatever may be said as to the legal effect of the instrument signed by Mr. Ashley, it is clear that the Construction Company abandoned the property and the Railway Company took possession. The Construction Company held the title subject to speedy forfeiture, and, while there is dispute in the testimony as to whether there was ever the formality of a surrender, it is evident that all parties in interest understood that it had practically abandoned the property. It in fact received a consideration, the nature and value of which will be considered hereafter, and with its knowledge the Railway Company and the trustees entered into a new contract involving expenditures by the Railway Company, and with like knowledge the Railway Company proceeded to complete the railroad. Under these circumstances it would be ignoring the substance of things to hold that the title still remained in the Construction Company. But the difficult question is the other, and in respect to this I notice, first, that there are no especial equities in complainants' claim, either against the Construction Company or upon this property. Not a single rail was ever received by the company or placed upon the road-bed. In other words, the property was in no manner improved and the company never received anything. While the complainants' claim is undoubtedly a just debt, it is only a naked, barren legal obligation, unattended with any equities as against the company or the property.

Secondly. There is nothing in the conduct of either the Construction or Railroad Company which indicates bad faith or an effort to avoid just liabilities. The Construction Company had about seventy-five thousand dollars, two-thirds of which went to complainants, the Company receiving nothing therefor; nineteen thousand dollars of it to the trustees for the purchase of the property, and the balance was ex-

expended in surveys and kindred matters. Finding itself unable to complete its undertaking, it practically abandoned the work; and the contract, in pursuance of which the Railroad Company paid out money and assumed liability, was executed nine months before; by the commencement of suit notice was given of any intention on the part of the complainants to make further claim against the Construction Company.

Thirdly. There was a consideration; it appears that the Construction Company received one hundred thousand dollars in income bonds of the Railway Company. It is contended that these were worthless, and doubtless their only value was speculative, but what was the value of that which the Construction Company parted with? It would be grossly unfair to estimate its value by the money expended on the road-bed and masonry. Even when a railroad is completed and in operation the cost is a very uncertain test of value. The amount of business which the road does, the earnings which it makes, are far more certain tests of value than the cost of construction. As the cost is a poor test of value in a completed road, much more is it so in reference to the disconnected fragments of an incomplete road, and this when the owner has a perfect and indefaesible title. And here it must be borne in mind that the road-bed had been lying for over four years uncared for and subject to all the waste and deterioation which comes from rains and the changes of seasons. But beyond all this the Construction Company had no indefeasible title. It had done no work during its possession, or practically none, and its title was subject to a speedy forfeiture. It was almost an impossibility for it in the time left to have performed the conditions necessary to prevent a forfeiture, so that practically it held title subject to the pleasure of trustees, its vendors. Under these circumstances what was the value of its interest? Certainly most trifling, and, although from the testimony I cannot find that there was ever any formal surrender to the trustees, it is obvious that the parties treated the matter as though the forfeiture had been made, as though the Construction Company had abandoned the work and the way was opened for a new arrangement between the Railway Company and the trustees. The value of the

income bonds may have been and was purely problematical and speculative, but was that value any less than that of the interest of the Constructing Company in the property? It is very difficult to believe that it was. Looking at all the circumstances surrounding these transactions, it seems to me that it would be grossly inequitable to permit the complainants to treat this property as then the absolute and indefeasible property of the Construction Company and to charge it with their claim as having been sold and conveyed in fraud of their rights. The complainants may have lost some portion of the profits expected from their contract, but the Construction Company lost all that it had, and the Railway Company, while it received something, got no more than it might have easily obtained from the trustees directly after a forfeiture had been formally declared. Indeed, as I have before said, the parties seemed to have acted as if the forfeiture had already been declared and the interest of the Construction Company had ceased.

The first stipulation in the contract between the Railway Company and the trustees recited that the conditions in the deed from the trustees to Brooks are annulled, rescinded, and extinguished, and in lieu thereof the conditions following are provided, implying plainly that there was a new transaction between new parties in lieu of that which had proved practically a failure.

For these reasons I think that the defendants are entitled to a decree dismissing the bill, and this without reference to the technical questions presented as to the effect of the attachments placed upon the road-bed and masonry.

The bill will be dismissed at complainants' cost.

EXTRACTS FROM REVISED STATUTES OF MISSOURI 1879.

CONVEYANCES BY CORPORATIONS.

"Sec. 672. Any private corporation authorized to hold real estate may convey the same by deed, sealed with the common seal of such corporation, and signed by the president or presiding member or trustee thereof, and such deed, when acknowledged or proved, as other deeds of real estate are by law required to be acknowledged or proved, shall be recorded in the proper office, and have like effect as other deeds."

"Sec. 743. It shall be lawful for any corporation to convey lands by deed, sealed with the common seal of said corporation, and signed by the president or presiding member or trustee of said corporation, and such deed, when acknowledged by such officer to be the act of the corporation, or proved in the usual form prescribed for other conveyances for land, shall be recorded in the recorder's office of the county where the land lies, in like manner with other deeds."

REPORT TO RAILROAD COMMISSIONERS.

Sec. 841. "Every railroad company incorporated or doing business in this state, or which shall hereafter become incorporated or do business under any general or special laws of this state, shall, on or before the first day of September, 1875, and annually thereafter on or before the first day of August, transmit to the office of the railroad commissioners a full and true statement, under oath, of the proper officers of said corporation, of the affairs of the corporation as the same existed on the first day of the preceding July, specifically: First, the amount of capital stock subscribed, the number of shares and the par value thereof; second, the names of the owners of the stock, the amount owned by them respectively, and the residence of each stockholder as far as known; third, the amount of stock paid in and by whom; fourth, the amount of its assets and liabilities; fifth, the names and places of the residence of its officers; sixth, the amount of funded debt; seventh, the amount of floating debt; eighth, the estimated value of the road-bed, including iron and bridges; ninth, the estimated value of rolling stock; tenth, the estimated value of stations, buildings and fixtures; eleventh, the estimated value of other property; twelfth, the length of single track on main line; thirteenth, the length of double track on main line; fourteenth, the length of branches, stating whether they have single or double track; fifteenth, the aggregate length of siding and other tracks above enumerated; sixteenth, the number of tons of through freight carried during the year preceding the making of the report; seventeenth, the number of tons of local freight carried during the same time; eighteenth, the monthly earnings for the transportation of passengers during the same time; twentieth, the amount of expenses

incurred in running and management of passenger trains, in the running and management of freight trains, and in the running and management of mixed trains during the same time; twenty-first, the expenses incurred in the running and management of the road, including the salaries of officers for the same time, which shall be reported separately; twenty second, the amount expended for repairs, including maintenance of roadway, repairs and renewal of bridges, ties and iron; twenty-third, the amount expended for other improvements not included in the last subdivision; twenty-fourth, the amount expended for motive power, cars, station houses, and all other buildings and fixtures, including all other expenditures in the management and running of said road; twenty-fifth, the rate of fare for passengers for each month during the same time through and way passengers separately; twenty-sixth, the tariff of freights, showing the change of tariff, if any, during the same time; twenty-seventh, a copy of each published rate of fare for passengers and tariff of freight issued for the government of its agents during the same time; and whether the rate of fare and tariff of freights in such published list are the same as those actually received by the company, and if not, what were received; twenty-eighth, what express companies run on its roads and on what terms and conditions and the kind of business done by them; twenty-ninth, what freight and transportation companies run on its roads, and on what terms, and whether such freight and transportation companies use the cars of the railroad company or the cars furnished by themselves; thirtieth, whether the freight or cars of such transportation companies are given any reference in speed or order of transportation, and if so, what; thirty-first, what running arrangements it has with other railroad companies; and answer such additional interrogatories as such commissioners may make and propound to the said Railroad Companies and this section shall apply to the president, directors and general officers of every railroad company now existing or which shall hereafter be organized and exist in this state, and to every lessee, manager or operator of any railroad within this state."

RIGHT TO BILL IN EQUITY TO AID ATTACHMENT.

"Sec. 448. Any attaching creditor may maintain an action for the purpose of setting aside any fraudulent conveyance, assignment, charge, lien or incumbrance of or upon any property attached in any action instituted by him; and where several attachments in favor of different plaintiffs are levied on the same property, all or any number of such plaintiffs may join in the same action for that purpose."

This is probably but declaratory of the right which exists in equity independently of statute. See cases cited in note 1, 3 Pom. Eq. Jur. Sec. 1415

STATUTORY INTERPLEA.

Sec. 449. Any person claiming property, money, effects or credits attached, may interplead in the cause, verifying the same by affidavit, and issues may be made upon such interplea, and shall be tried as like issues between plaintiff and defendant, and without any unnecessary delay."

FRAUDULENT CONVEYANCES.

"Sec. 2502. This chapter shall not extend to any estate or interest in lands, tenements or hereditaments, goods or chattels, or any rents, profits or commons out of the same, which shall be upon valuable consideration and *bona fide* and lawfully conveyed; nor shall it be construed to avoid any deed as against any subsequent *bona fide* purchaser from the grantee for a valuable consideration and without any notice of fraud."

"Sec. 2497. Every conveyance or assignment in writing or otherwise of any estate or interest in lands or in goods and chattels, or in things in action, or of any rents and profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution made or contrived with the intent to hinder, delay or defraud creditors of their lawful actions, damages, forfeitures, debts or demands, or to defraud or deceive those who shall purchase the same lands, tenements or hereditaments or any rent, profit or commodity issuing out of them, shall be from henceforth deemed and taken as against said creditors and purchasers prior and subsequent, to be clearly and utterly void."

WARRANTY DEED.

"Sec. 675. The words 'grant,' 'bargain' and 'sell,' in all conveyances in which any estate of inheritance in *fee simple* is limited, shall, unless restrained by express terms contained in such conveyances, be construed to be the following expressed covenants on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns: First, that the grantor was at the time of the execution of such conveyance, seized of an indefeasible estate in fee simple in the real estate thereby granted; second, that such real esate was, at the time of the execution of such conveyance, free from incumbrances done or suffered py the grantor or any person under whom he claims; third, for further assurances of such real estate to be made by the grantor and his heirs to the grantee and his heirs and assigns; and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance."

ATTACHMENTS.

"Sec. 742. Any corporation incorporated by any other state or country, and having property in this state, shall be liable to be sued, and the property of the same shall be subject to attachment, in the same manner as individuals, residents of other states or countries and having property, are now liable to be sued, and their property subject to be attached."

"Sec. 743. It shall be lawful for any corporation to convey lands by deed, sealed with the common seal of said corporation, and signed by the president or presiding member or trustee of said corporation, and such deed when acknowledged by such officer to be the act of the corporation, or proved in the usual form prescribed for other conveyances for lands, shall be recorded in the recorder's office of the county where the land lies, in like manner with other deeds."

Sec. 416. Under an attachment, the officer shall be authorized to seize, as attachable property, the defendant's account books, accounts, notes, bills of exchange, bonds, certificates of deposit, and other evidences of debt, as well as his other property, real, personal and mixed."

"Sec. 418. When there are several defendants, who

reside or have property in different counties, and when a single defendant, in any such action, has property or effects in different counties, separate writs may issue to every such county."

"Sec. 420. The manner of serving writs of attachment shall be as follows:

I. * * * *

II. * * * *

III. When lands or tenements are to be attached, the officer shall briefly describe the same in his return, stating the quantity and situation, and declare that he has attached all the right, title and interest of the defendant in the same, or so much thereof as shall be sufficient to satisfy the debt and interest, or damages and costs; and shall also file in the recorder's office of the county where the real estate is situated an abstract of the attachment, showing the names of the parties to the suit and the amount of the debt, the date of the levy and a description of the real estate levied upon by the same, which shall be duly recorded in the land records."

"Sec. 700. The term 'real estate,' as used herein, shall be construed as co-extensive in meaning with lands, tenements and hereditaments, and as embracing all chattels real."

"Sec. 2354. The following property shall be liable to be seized and sold upon attachment and execution issued from any court of record. * * * * * * * All real estate whereof the defendant, or any person for his use, was seized, *in law or equity*, at the time of the issue and levy of the attachment, or rendition of the judgment, order or decree, whereon execution was issued, or at any time thereafter."

"Sec. 2356. The term 'real estate,' as used in this chapter, shall be construed to include all estate and interest in lands, tenements and hereditaments."

"Sec. 3124. When any subject matter, party or person, is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included."

"Sec. 3126. The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute. * * * * * Ninth, the terms 'real property' or 'premises' of 'real estate' or 'lands' shall be deemed to be co-extensive with lands, tenements and hereditaments; tenth, the words 'personal property' shall include money, goods, chattels, things in action and evidences of debt; eleventh, the word 'property' shall include real and personal property. * * *."

Office Supreme Ct.
FILED
JAN 13 189
JAMES H. McKENN
Cl

IN THE

Supreme Court of the United State

OCTOBER TERM, 1893.

Term No. 243.

B. SCHLESINGER *et al.*,
Appellants,

vs.

THE KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*,
Appellees.

Statement and Brief of The Kansas City & Southe Railway Company, Appellee.

CHARLES O. TICHENOR,
For Appellee.

THE S. F. WOODY PTG. CO., KANSAS CITY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

Term No. 243.

B. SCHLESINGER *et al.*,
Appellants,

vs.

THE KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*,
Appellees.

THE BILL.

This is a suit to charge the road of defendant Railway Company with the payment of a judgment rendered October 20, 1885, against defendant Construction Company in a suit brought in October, 1881.

Complainants' original bill was filed November 10, 1881, against the Kansas City & Southern Railroad Company alone and they complain of a deed to said Company.

On December 15, 1884, an amended bill was filed which states that the Kansas City & Southern Railroad Company was never formed (p. 16).

The Kansas City & Southern Railway Company, the Kansas City & Southern Construction Company, the Farmers Loan & Trust Company and James I. Brooks were made parties by the amended bill.

Complainants complain of an instrument in writing

w

dated September 18, 1880, signed by the Kansas City & Southern Construction Company by Henry Ashley, agent; that "said defendant Railway Company has since 1880 and now has possession of such property," being the same property levied upon by attachment in complainants' suit at law; that the consideration recited in the deed to the Railway Company is "wholly colorable" and "is and was without any consideration whatever" and "is and was a voluntary conveyance of said defendant Construction Company not upheld by any consideration"; "that the defendant Railway Company now claims the title to the property * * * without having paid any consideration whatever therefor"; that this property is bound in equity for the payment of complainants' claim and is a trust fund for the "discharge and satisfaction" of the same; that defendant Railway Company took said property with "full knowledge" of the existence of the indebtedness of the defendant Construction Company to complainants under the contract upon which suit had been brought.

Complainants pray that the deed to the railway company may be decreed "voluntary, fraudulent and void."

On the 7th of April, 1887, complainants filed a supplemental bill alleging the recovery of the judgment against the Construction Company in their favor.

THE EVIDENCE.

A part of the road in controversy first belonged to the Kansas City, Memphis & Mobile Railway Company, which was adjudged a bankrupt in 1876. At this time several miles of road-bed had been graded and some masonry and other work had been done. On April 25, 1877, the assignees in bankruptcy sold the road to J. D. Bancroft for $15,025 (p. 111). He bought for others who desired the

road, not to make money, but to control it in the interests of Kansas City (p. 281). On the 27th of April, 1877, Bancroft made a deed to trustees for the purchasers (p. 114). The title was so held until January 13, 1880, when they sold to one Brooks for $19,156.87, who bought for and afterwards conveyed to (p. 122) defendant Construction Company. This deed to Brooks (p. 118) was made upon the express condition that second party should build a railroad from Kansas City to Harrisonville or Belton, Missouri, on or before January 1, 1881, so as to be ready for use, and also to build the road to the coal fields of Bates County on or before July 1, 1881, so as to be ready for use; "and if said second party shall fail to build said railroad to said coal fields as aforesaid, then the property hereby sold as aforesaid shall revert to said first party and re-invest in them the same as they now hold the same."

The deed provided further that as soon as said party had spent $50,000 in the construction of said railroad, beginning at Kansas City, then "the provision for reversion of said property" should become null and void and said first parties should execute a writing "acknowledging the waiver and extinguishment of said forfeiture."

On September 18, 1880, the Construction Company made a deed of its property to defendant Railway Company for a recited consideration of $250,000. This deed was under the seal of the company and was attested as follows (p. 22):

"In witness whereof the Kansas City & Southern Construction Company hath caused this indenture to be signed and its corporate seal hereto affixed by its agent, Henry Ashley, thereto, duly authorized by corporate vote, the day and year first above written."

"THE KANSAS CITY & SOUTHERN CONSTRUCTION COMPANY,
"By Henry Ashley, Agent.
"Attest: Geo. B. Ripley, Secretary."

The acknowledgement, in accordance with the statutes

of Missouri, (1 Vol. R. S. Mo. p. 614) contains an affidavit that the corporate seal was affixed and the corporate name signed by order of the board of directors of said company. Ashley was at the time president of the company (p. 234).

Under this instrument defendant Railway Company took possession, completed and operated the road (p. 219). It executed a deed of trust to defendant Trust Company (p. 145). The real consideration for the deed by the Construction Company was $100,000 income bonds of the Railway Company received by it.

The Construction Company when it made this deed was, in fact, without assets (p. 239), for all of its money was gone and its other property must revert according to the terms of the Brooks deed, and all regarded this result inevitable (pp. 232, 257, 259, 272).

On the 15th day of December, 1880, sixteen days before the time when the road must revert (for it was self-evident that it could be not built in sixteen days), defendant Railway Company made a contract with the said grantors (p. 275) which not only called attention to the terms of the Brooks deed, but also recited that the Railway Company had not been able to comply with them. By it the terms of the deed were modified, the Railway Company depositing with said grantors $25,000 "as a guarantee of good faith of its purpose to build a railroad." The work, or at least some of it, done prior to the purchase by the Construction Company, was done in 1871, and according to complainants' evidence much of the dirt work was washed away (pp. 204, 253); the bridges were decayed (p. 204) and some of the piers and culverts in 1888 looked as if they had been built twenty-five years (p. 213).

The defendant Construction Company by Brooks, treasurer, on March 2, 1880, entered into a contract with plaintiffs (p. 198) under the name of Naylor & Co. for steel rails. Plaintiffs received

on this contract from the Construction Company $50,000, but they never delivered a pound of rails (p. 197). They also got a judgment for damages against said company for $49,448.11, no one appearing at the trial for the defendant (p. 133). This judgment was reduced to $35,901.39 (p. 134). Brooks, who made this contract, and who had trouble with his company (p. 234), says that the Construction Company spent from twenty to thirty thousand dollars on the road, which is a mistake unless he refers to the $19,156.87 paid for the road-bed; for Tenney, who was connected with the company, says (p. 232) that only $75,000 was raised by it, of which plaintiffs got $50,000; the original purchase money was paid from this and the balance was paid for engineering. This contract with complainants bankrupted the company (p. 239).

Brooks, as president of the Construction Company, made a deed to the Kansas City and Southern Railroad Company (p. 4). There never was any such corporation (p. 235). One of the complainants says (p. 189) they sold their claim for damages upon which judgment was rendered to one Sargeant for $4,000, and received payment from Charles Meriam, but that he cannot say that Meriam is the treasurer of the Missouri, Fort Scott and Gulf Railroad. Tenney says (p. 235) that neither the Railway Company nor the Construction Company knew of complainants' claim for damages at the date of the transfer by the Construction Company to the Railway Company. And there is no evidence tending to show either that the Construction Company sold or that the Railway Company bought for the purpose of defrauding complainants.

An attachment issued in complainants' suit at law. It was levied in four counties; one on the 7th, on the 11th, and two on the 12th day of October, 1885 (pp. 141, 142, 143, 144).

The property levied upon was described as "all the

right, title and interest of said defendant, The Kansas City and Southern Construction Company, of, in and to the following-described property, to-wit: The Kansas City, Memphis and Mobile Railroad, running from Kansas City, Jackson County, Missouri, in the direction of Memphis, Tenn. and Mobile, in Alabama, and through the States of Missouri and Arkansas."

The opinion of Mr. Justice Brewer, who decided the case, begins upon page 53.

BRIEF.

I.

It was claimed below that the deed to defendant Railway Company was ineffectual to pass title.

(*a*) Statutory mode of conveyance does not exclude other modes.

Saltmarsh v. Spaulding, 147 Mass. 228.
Morris v. Keil, 20 Minn. 531.
Bason v. Mining Co., 90 N. C. 417.

(*b*) It is competent for a corporation to execute a deed by any agent authorized to do the act.

Tenney v. Lumber Co., 43 N. H. 355.
Arms v. Conant, 36 Vt. 744.

(*c*) And where one is directed by a corporation to execute a deed, this makes him a special agent to do that act.

Burris Executors v. McDonald, 3 Gratt. 235.

(*d*) The secretary is the proper officer to affix the corporate seal.

Underhill v. Santa Barbara Co., 93 Cal. 314.

(*e*) When the common seal of a corporation appears to be affixed to an instrument, the seal itself is *prima facie* evidence that it was affixed by proper authority, and the contrary must be shown by the objecting party.

Koehler v. Black River Falls Co., 2 Black, 717.
Indianapolis R. R. Co. v. Morganstern, 103 Ill. 149.
Johns Ch. v. Steinmetz, 18 Pa. 273.
Hopkins v. Gallatin Turnpike Co., 4 Hump. 411.

(*f*) The deed is *prima facie* good.

McDaniels v. Flower-Brook Mfg. Co., 22 Vt. 285.

(*g*) The Supreme Court of Missouri has been liberal in sustaining deeds of corporations.

The City of Kansas v. The H. & St. J. R. R., 77 Mo. 183.
Chouteau v. Allen, 70 Mo. 324.
Wells v. Pressy, 105 Mo. 179.

II.

(*a*) If the deed was defective it was good as a contract. Even a verbal contract, possession taken under it by vendee and payment of purchase money, create an equitable title.

Price v. Hart, 29 Mo. 171.
Tatum v. Brooke, 51 Mo. 148.
Walker v. Owen, 79 Mo. 569.
Adair v. Adair, 78 Mo. 630.

A donee of land, put in possession, may compel a deed, if he has made lasting improvements.

Dozier v. Matson, 94 Mo. 332.

"The person making a parol contract to convey lands may or may not insist on the protection of the statute. If he will confess the agreement and not insist on the statute, its performance will be enforced against him."

Aultman v. Booth, 95 Mo. 383.

(*b*) The Construction Company having received the consideration could not deny the authority of the one who executed the deed therefor.

Wood v. Wheeler, 93 Ill. 167.

And if imperfectly executed it can be corrected in equity.

West v. Menard County Board, 82 Ill. 206.
Randolph v. The N. J. W. L. R. R., 28 N. J. Eq. 49

(*c*) The Construction Company has never questioned this deed; it delivered possession and has suffered defendant Railway to build and operate the road.

"But the corporations themselves, like other principals, may nevertheless act and be bound in any of the modes not opposed to the general rules of law applicable to such bodies. They may previously resolve; they may subsequently acquiesce; they may expressly ratify; they may intentionally receive and appropriate the proceeds of the unauthorized transaction and so put it out of their power to dispute its validity."

Curtis v. Leavitt, 15 N. Y. 49.

Where an unauthorized act of an agent of a corporation

is clearly beneficial to the corporation a presumption of ratification will arise from slight circumstances.

Washington Savings Bank v. Bank, 107 Mo. 145.

"There is no lack of authority to show that such acts of acquiescence and recognition bind the company, its officers and stockholders as thoroughly as though the instruments in question were executed with the most rigid observance of all the technical formalities known to the law."

Chouteau v. Allen, 70 Mo. 325.
Campbell v. Pope, 96 Mo. 473.
Hull v. Glover, 126 Ill. 126.
West Salem Land Co. v. Montgomery Land Co., (Va.) 15 S. E. Rep. 524.

III.

How can plaintiffs attack this deed because of informal matters? In *St. Louis &c. v. Risley*, 28 Mo. 419, the court says:

"The objection that this deed is not the act of the corporation does not come from the corporation itself. From anything that appears the corporation is satisfied with the act of the mayor and is willing to abide by it. * * * When a municipal corporation is satisfied with the act of its agent and is willing it should stand, there should be a solid reason why third persons having no interest in the matter should be permitted to invalidate. If an act has been done for and in the name of another and he being aware of it does not object to the want of authority in his agent, why should a third person be suffered to do it for him?"

This is not like a case of ejectment, where a person must introduce an informal deed to show a legal title, but

w

one where a person is attacking a deed who has no interest and can have no interest, if the sale was *bona fide.*

The amended bill admits it to be a deed. "Your orators charge that the consideration recited in each of said deeds is wholly colorable and that each of said deeds was made without any consideration whatever, and each deed is and was a voluntary conveyance of said defendant Construction Company" (p. 16).

IV.

The Construction Company received for its interest in the old road-bed $100,000 of the income bonds of the defendant railway.

It promised to pay therefor $100,000, pledging its income to secure the same. Such bonds are valid.

Union Pacific R. R. v. U. S., 99 U. S. 402.
Rutter v. Union Pacific R. R., 17 Fed. R. 480.
Legard v. Hodges, 1 Vesey, Jr. 477.

The Construction Company had but $75,000, of which it paid $19,156.87 for the old road-bed. Complainants received $50,000 of the balance, giving nothing in return for it, thereby ruining the company, which had to sell, and did sell, what it originally got (then worthless because about to revert to the vendors) for these income bonds. Had complainants attached the interest of the company in this property before it sold the same, the lien of the attachment would have ended by the reverter long before it could have been adjudicated whether they were entitled to any damages beyond the $50,000 which they had appropriated on account thereof. The suit for damages was brought against the Construction Company a year after it had parted with its title, and there is no evidence tending to show that the sale

was made to cheat complainants, or even that the Railway Company knew that complainants claimed anything beyond that they had received.

Mr. Justice Brewer says (pp. 56 and 57): "Not a single rail was ever received by the company or placed on the roadbed. In other words, the property was in no manner improved, and the company never received anything; while the complainants' claim is undoubtedly a just debt, it is only a naked, barren, legal obligation, unattended with any equities as against the company or the property. Secondly, there is nothing in the conduct of either the Construction or Railroad Company which indicates bad faith or an effort to avoid just liabilities."

V.

"But beyond all this the Construction Company had no indefeasible title. It had done no work during its possession or practically none, and its title was subject to a speedy forfeiture. It was almost an impossibility for it in the time left to have performed the conditions necessary to prevent a forfeiture, so that practically it held title subject to the pleasure of the trustees its vendors * * * and although from the testimony I cannot find that there was ever any formal surrender to the trustees, it is obvious that the parties treated the matter as though the forfeiture had been made, as though the Construction Company had abandoned the work, and the way was opened for a new arrangement between the Railway Company and the trustees."

Opinion of Mr. Justice Brewer (p. 57.)

The vendors, the trustees, made no actual entry, because the Construction Company did not dispute this right. Its sale was notice that it could not and would not comply with the terms of the deed and that it had quit. The new con-

tract with the vendee, the Railway Company, was an admission not only that said vendors were claiming the right to enter, but that they were entitled so to do.

An actual entry under the circumstances would have been of no service. "The reason of the thing is agreeable to the practice, for it is absurd to entangle men's rights in the nets of form without meaning." The law did not command the parties to vex the courts with this matter when they could accomplish the same result so speedily and easily without their aid. The Construction Company sold because it could not build the road; the railway bought because it could; facts recognized and acted upon by the trustees.

It makes little difference with appellees whether the condition in the deed avoids the estate by not permitting it to vest until it was literally performed, or whether the estate was to be defeated by the non-performance by divesting the title, the continuance depending upon the performance of an act, the estate reverting upon the happening of a contingency. Certain it is that the thing sought to be accomplished by the deed was of a public character, as much so as if the vendor had been the United States or a State. The vendors sold not to make money, but to get a railroad built. Except for this the deed would not have been made. The Construction Company was to make improvements, but this was a part of the consideration for the deed.

The condition in the deed was not an injunction against the vendee doing something. The vendee had no choice. It had to build a road and by a certain time, and when it did so it was entitled to another instrument from the trustees (p. 118).

The language of the decisions is, there must be "an entry or some act equivalent to it."

Ellis v. Kyger, 90 Mo. 606.

Until the grantee or his heirs "by entry (or its equiva-

lent a continued claim) have manifested in the way required by law their determination to take advantage of the breach of condition or avail themselves of their legal rights and to reclaim the estate thus forfeited," is the language of

Warren v. Bennett, 31 Conn. 477.

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for the breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and therefore an office was found necessary to determine the estate, but as said by this court in a late case, 'the mode of asserting or of resuming the forfeited grant is subject to legislative authority of the government.'

"It may be after judicial investigation or by taking possession directly under the authority of government without these preliminary proceedings."

Schulenberg v. Harriman, 21 Wall. 63.

In *Farnsworth v. M. & P. R. R.*, 92 U. S. 66, this court said: "Such mode of ascertainment and determination—that is, by judicial proceedings—is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, imparting verity against the grantee, the facts upon which the forfeiture depends, and thus avoids uncertainty in titles and consequent litiga-

tion. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the estate after default of the grantee—such as an act resuming control of them and appropriating them to particular uses or granting them to others to carry out the original object—will be equally effectual and operative. * * * In this case there were special reasons for the provision for a forfeiture and for its immediate enforcement by the state, in case of the grantee's failure to construct designated portions of the road within the time prescribed. * * * It was therefore necessary for the state to see that the construction of the road was commenced and pushed forward without unnecessary delay, to prevent a possible loss of portions of the grant. By the clause of forfeiture the state was enabled to retain such a control over the lands and connected franchises that in case the company failed to build the road in time, it could make arrangements with other companies or parties for that purpose. This control would have been defeated if the state had been subjected to the delay of judicial proceedings before a forfeiture could have been enforced. A more summary mode of divestiture was therefore essential, and was contemplated by the parties."

In the case at bar the object sought by the grantors, the trustees, was a railroad, and within a time certain. This appears as plainly from the contract as if contained in a legislative act. The Construction Company failed and admitted it could go no further. With its consent the trustees made a new contract with the Railway Company; not to defraud any one; not to make money, but simply to carry out that which the Construction Company failed to do. The

interests of the public, for whom the trustees were acting, demanded this. The whole transaction was fair, open and in writings which could be recorded. It appeared of record just as plainly as if it had been done by a court, thereby making the title to the property certain. By all this the trustees asserted their rights; in effect assumed control and accomplished the original object.

"Legislation to be sufficient must manifest an intention by congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture and a judgment therein establishing a right, it should be direct, positive and free from all doubt or ambiguity."

St. Louis &c. Railway Co. v. McGee, 115 U. S. 474.

"It follows that congress had the power, after the lapse of the time during which the right to any conveyance could have been earned, to impose a condition upon which such right could be earned in the future. The application by the petitioner for a conveyance, a patent must be taken as an assent by it to the condition imposed by the act of 1876."

Pacific R. R. Co. v. U. S., 124 U. S. 130.

VI.

Complainants had no judgment in November, 1881, when they filed their bill. They had none in December, 1884, when they filed their amended bill. Complainants file a supplemental bill in April, 1887, solely to announce that they had recovered judgment against the Construction Company in February, 1886.

A claim purely legal, involving a trial at law, cannot be made the basis of relief in equity until reduced to judgment.

Swan L. & C. Co. v. Frank, 148 U. S. 612.

It may be claimed that this court ought to have said that a levy under an attachment was sufficient.

If so then we say the levy was void.

(*a*) Drake says, Sec. 4 (in 5th Ed.) of his work on attachment: "Nothing more distinctly characterizes the whole system of remedy by attachment than that it is—except in some states where it is authorized in chancery—a special remedy at law belonging exclusively to a court of law and to be resorted and to be pursued in conformity with the terms of the law conferring it, and that where from a conflict of jurisdiction or from other cause the remedy by attachment is not complete and full, a court of equity has no power to pass any order to aid or perfect it."

McPherson v. Snowden, 19 Md. 233.

Hence it is that some property cannot be reached by the writ, it being an incomplete remedy; and it is held in such cases that the remedy avails nothing, *e. g.* the mortgagee's interest in land, even after possession is taken because of breach of conditions.

Smith v. Bank, 24 Me. 195.

A still larger class of cases exists where it is not permitted though it seems to be within the letter of the law. This class of cases is held not to be proper for the remedy by attachment because it would be contrary to public policy to allow it; to do so would embarrass the government.

Simpson v. Turner, 76 N. C. 116; and cases cited.
Klein v. New Orleans, 99 U. S. 149;
Merriweather v. Garrett, 102 *Ib.* 501.

So it was held in *M. C. R. R. v. C. & M. L. R. R.*, 1 Ill. Ap. 406, where it was sought to attach rolling stock in possession of another company that an attachment would

not lie, the court saying "such an interference by creditors with the operation of common carriers in the exercise of their common employment is, we think, so far in conflict with sound public policy as to warrant us in holding cars of one company in possession of another not liable to garnishment."

b. A railroad is a public highway for the public benefit and the right to exact pay for travel on it does not render its use a private one. The public interest is just as clear as if it was free, or as if it was operated by the state.

Hence the right to condemn; the constitutionality of statutes giving cities, villiages, townships, and counties power to subscribe to stock, to make donations and to issue bonds to such corporations.

Hence the Supreme Court of Missouri denies, in absence of a positive statute, the right to file a mechanic's lien on such property.

Dunn v. N. Mo. R. R., 24 Mo. 493.

The judge said in *Georgia v. A. & G. R. R.*, 3 Woods C. C. 437, that while a railroad was a highway it was a very peculiar kind. "It is not land, nor like land in the ordinary sense." "The Company holds it under a franchise for a particular purpose. The interest the public has in it is greater and more important than that which the company has in it."

(*c*) A statute giving a right to levy and sell under execution does not authorize a levy by attachment.

Foster v. Potter, 37 Mo. 529.

So far as we know there is no way provided by our statute to attach a railroad or even to sell it under execu-

w

tion. Plaintiffs have invented a way, *i. e.*, by making a levy under many writs issued to different sheriffs of different counties.

Scoggin v. Perry, 32 Texas 30.

Railroads cannot be levied upon and sold upon executions.

Gue v. The Tide Water C. Co., 24 How. 257.
Hammock v. Loan & T. Co., 105 U. S. 91.
East Ala. R. Co. v. Doe, 114 U. S. 341.
McPhelters v. M. Bridge Co., 28 Mo. 468.

True, under the constitution, rolling stock is personal property and can be sold under execution.

This furnishes a strong implication that the levy was intended to be restricted to this kind of corporate property. It is a modification of the general rule that the property of a railroad company necessary for railroad purposes cannot be seized and sold at law.

Hammond v. Loan & T. Co., 105 U. S. 91.

(*d*) Stronger reasons obtain for not allowing a railroad to be seized while being constructed than after the completion. Every inducement ought to be given to finish, not only because the public is interested in getting the road, but it is a matter of general notoriety that these roads are partly built, and finished up to point of getting rolling stock, by the cities and counties through which they run.

In *East Ala. R. R. Co. v. Doe*, 114 U. S. 350, the court said: "No fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law separate from the franchise to make and own and run a railroad. The corporation could not have made a voluntary conveyance of the right of way severed from this franchise; what it acquired was merely an easement in the land

to enable it to discharge its functions of making and maintaining a public highway, the fee of the soil remaining in the grantor."

(*e*) The case is here still stronger. Public spirited men were risking their money solely to get a road built to Kansas City. The contract they entered into was not only legal, it was praiseworthy. It is elementary that even where the writ of attachment is valid the plaintiff obtains by it no higher or better right than the debtor had at the date of the levy.

Drake on Att. 223 Sec.

VII.

Complainants suffered their suit for damages against the Construction Company to drag along from October 7, 1881, until February 1, 1886. Defendant Railway Company was not made a party to the chancery suit until December 15, 1884.

If parties are ever required to act promptly it must be in a case like this. A sale is sought to be set aside. Parties seeking to do this wait year after year until a railroad is built and operated under this sale before they even get judgment in their suit at law.

CHARLES O. TICHENOR,

For the Kansas City & Southern Railway Company, Appellee.

Office Supreme Court U. S.
FILED.
JAN 27 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

TERM No. 243.

IN EQUITY.

BARTHOLD SCHLESINGER AND SEBASTIAN B. SCHLESINGER, Partners doing business under the firm name and style of NAYLOR & COMPANY, *Appellants*,

vs.

THE KANSAS CITY AND SOUTHERN RAILWAY COMPANY, THE KANSAS CITY AND SOUTHERN CONSTRUCTION COMPANY, THE FARMERS LOAN AND TRUST COMPANY AND JAMES I. BROOKS, *Appellees*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

APPELLANTS' BRIEF IN REPLY.

WALLACE PRATT,
JEFFERSON BRUMBACK,
FRANK HAGERMAN,
For Appellants.

Supreme Court of the United States

OCTOBER TERM, 1893.

BARTHOLD SCHLESINGER *et al.*, *Appellants*,

vs.

THE KANSAS CITY & SOUTHERN RAILWAY COMPANY *et al.*, *Appellees.*

In Equity.
No. 243.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

APPELLANT'S BRIEF IN REPLY.

In the sixth subdivision of respondents' brief (pp. 15–19) it is contended that the bill cannot be maintained because at the time it was filed appellants' demand was not reduced to judgment. This defense, *although not pleaded*, was apprehended as a possibility, and in our original brief we attempted to meet it. (Par. IX, pp. 59–69.) To the position taken by respondent there are several answers, but before stating them permit us to call attention to the facts: On October 7, 1881, appellants as plaintiffs in a law action attached the property in question. (Bill, Rec. 13–15, par. IV, p. 19. par. VIII; Answer p. 28, lines 9–16, p. 31, lines 17–19; Record in Attachment Suit, p. 129–133; Returns on Attachments, p. 141-144.) The defendant in the attach-

ment was a foreign corporation, having been organized under the laws of Connecticut (Art. Inc., Rec. 127) and by virtue of the state statute was expressly subject to attachment. (Rev. Stat. Mo., 1879, Sec. 742, set out in appendix to Orig. Brief, p. 78.) Because original process could not be served on this foreign corporation an order was made herein for substituted service (Rec. 37–39) in the equity suit. On November 10, 1881, pursuant to state statute so authorizing (Rev. Stat. Mo., 1879, Sec. 448, set out in appendix to Orig. Brief, p. 77) a bill in equity in aid of the attachment was filed (Rec. 1) against the Construction Company alone. December 15, 1884, an amended bill was filed making additional parties defendant. (Rec. 11–20.) On April 7, 1887, a supplemental bill was filed, showing that the law proceedings had ripened into judgment sustaining the attachments. (Rec. 33–34.) In the attachment suit, pursuant to statute so authorizing, (Rev. Stat. Mo., 1879, Sec. 449, set out in appendix to Orig. Bill, p. 77) the Railway Company filed an interplea (Rec. 130–132) claiming the property and expressly asserting that it was not subject to attachment. (Rec. 130, par. 2.) On October 20, 1885, there was a judgment *sustaining the attachment.* (Rec. 133.) *Both* companies filed motions for new trial (Rec. 133), and on these motions and on February 1, 1886, the judgment was modified in amount *and the attachments again sustained.* (Rec. 134.) Upon these facts there can be no reasonable doubt as to the right to maintain the bill.

1. *If we should concede that there was no lien at the time of instituting the suit, the result is not changed.*

(*a*) This because, before final hearing, and on April 7, 1887, a supplemental bill was filed (Rec. 33-34) showing that at such time the attachment proceedings had ripened into judgment. No objection was made to this as not being proper matter of supplement. Neither plea, demurrer nor answer was filed thereto. *Thereafter* no less than four stip-

ulations were filed as to a trial of the case (Rec. 50-52), thus treating the supplement as proper. The judgment itself (Rec. 134) was without objection offered in evidence. (See offer of documentary proof, Rec. 101, 102, par 20.)

It has been frequently stated that on appeal an objection cannot be raised that supplementary matter pleaded below was not germane to the original bill. (*Senft v. Manhatton R. Co.*, 14 N. Y. Supp., 876; *Gelatt v. Ridge*, (Mo.) 23 S. W. Rep., 882, 884; *Green v. Turner*. 36 Ark. 17.) So it has been held that if parties go to trial as if an issue were made according to the equity rules, an objection that the question was not properly raised cannot be asserted in this court. (*Kilbourn v. Souderland*, 130 U. S. 505, 514; *Coburn v. Cedar Valley Land Co.*, 138 U. S. 196, 221.) More than this it was recently (*Hollins v. Brierfield Coal & Iron Co.*, 14 Sup. Ct. Rep. 127, 128, 129) held by this court that the objection, that a bill could not be maintained because the legal remedies had not been exhausted, could be and was waived unless distinctly raised below. No such objection was raised below in this case. All that the answer says is that the property was not subject to attachment. We therefore submit that the defendant waived any such objection as that complainant was not a judgment creditor.

(*b*) But if it be true that this case was one where the general creditor filed a bill unaided by a lien, still equity has jurisdiction, because the debtor was a foreign corporation, so that it had to be proceeded against by attachment and had no property except that in controversy. If that property could not, as claimed, be attached or levied upon by execution then there was a situation in which a creditor's bill could be maintained without judgment. This exception, referred to in the original brief (p. 68, par. 4), has been recognized by this court. (*National Tube Works v. Ballou*, 146 U. S. 517, 526; *Russell v. Clark*, 7 Cranch, 69; *Kennedy v. Creswell*, 101 U. S. 641.) As put by Mr. Justice STRONG in *Case v. Beauregard*, 101 U. S., 688, 691:

"When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal processes."

Here no defense was asserted that the court had no jurisdiction because the legal remedies had not been exhausted. Mr. Justice BREWER in *Hollins v. Brierfield Coal & Iron Co.*, 14 Sup. Ct. Rep., 127, 128, 129, already referred to, states the doctrine applicable thus:

"It is urged, however, that this court has sustained the validity of the proceedings and decrees in suits of this nature in which it appears that the plaintiffs had not exhausted their remedies at law, and the cases of *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887, and *Mellen v. Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781, are cited as illustrations. But, passing by other matters disclosed by the facts of those cases, it will be noticed that in neither of them was the objection made at the outset; and when action on the part of the court was invoked. Defenses existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. * * * If there was a defense existing to the bills as framed—an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted—it was a defense and objection which must be made *in limine* and does not of itself oust the court of jurisdiction. This doctrine has been recognized, not merely in the cases cited, but also in those of *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594; *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct., 604."

To permit an affirmance now on the ground that the legal remedios had not been exhausted, is to say that a judgment upon the merits shall be sustained for want of jurisdiction of the case. Had the question been decided below the decree would have been a dismissal without prejudice. This practically illustrates the wisdom of the rule requiring such a defense to be specially pleaded.

2. *But there was a lien by attachment which could be aided by a creditor's bill, and therefore the bill was proper.*

(*a*) The state statute (Rev. Stat. Mo. 1879, Sec. 448, set out in appendix to Orig. Brief, p. 77) expressly gave the right to file a bill in aid of an attachment. This is a right enforceable by the equity courts of the United States. (*Clark v. Smith*, 13 Pet. 195; Brodenck's Will case, 21 Wallace, 520; *Holland v. Challen*, 110 U. S. 15.) In such case the bill is but ancillary to the original law proceedings where the debt is established. The two actions move without complications or injustice of any kind. Just as in this case the debt was established by the judgment at law and then the case in equity was tried.

(*b*) But the state statute is only declaratory, for the rule now is that a creditor's bill in aid of an attachment may be maintained. While at one time this proposition was not settled, the great weight of authority now sustains it, and it is responsive to reason and justice. The authorities are gathered in a note to 3 Pomeroy's Eq. Jur., Sec. 1415, in this language:

"An exception has been sought to be made in the case of attaching creditors, and the question has been presented whether equity will ever assist an attachment at law. It has been held, in accordance with the prevailing theory, that a creditor's suit may be maintained to reach real estate when a specific lien is created, that an attachment constitutes such a lien as to furnish grounds for equitable interference to remove fraudulent obstructions or impediments on the property, real or personal, attached, without the requirement of a judgment obtained, or the steps subsequent thereto, necessary in ordinary creditors' suits: *Falconer v. Freeman*, 4 Sand. Ch. 565; *Greenleaf v. Mumford*, 19 Abb. Pr. 469; *Skinner v. Stewart*, 15 Abb. Pr. 391; *Bates v. Plonsky*, 62 How. Pr. 429; *Kelly v. Lane*, 42 Barb. 594; *Mechanics, etc., Bank v. Dakin*, 51 N. Y. 519; *Heyneman v. Dannenberg*, 6 Cal. 376; 65 Am. Dec. 519; *Scales v. Scott*, 13 Cal. 76; *Robert v. Hodges*, 16 N. J. Eq. 299; *Curry v. Glass*, 25 N. J. Eq. 108; *Hunt v. Field*, 9 N. J. Eq. 36, 57 Am.

Dec. 365; *Williams v. Michenor*, 11 N. J. Eq. 520; *Ward v. McKenzie*, 33 Tex. 297, 7 Am. Rep. 261; *Tappan v. Evans*, 11 N. H. 311; *Dodge v. Griswold*, 8 N. H. 425; *Stone v. Anderson*, 26 N. H. 506; *Sheafe v. Sheafe*, 40 N. H. 516; See *Castle v. Bader*, 23 Cal. 76; *Chicago & A. Bridge Co. v. Anglo-Am., etc., Co.*, 46 Fed. Rep. 584 (Mo.); *Taylor v. Branscombe*, 74 Ia. 534; *Little v. Regan*, 83 Ky. 321; *Barton v. Barton*, 80 Ky. 600; *Perham v. Haverhill Fibre Co.*, 64 N. H. 2."

In *Tappan v. Evans*, 11 N. H. 311, the doctrine was asserted thus:

"The general principle deduceible from the authorities applicable to this case is that, where property is subject to execution, and a creditor seeks to have a fraudulent conveyance or obstruction to the levy or sale removed, he may file a bill as soon as he has obtained a specific lien upon the property, *whether the lien be obtained by attachment*, judgment or the issuing of an execution."

And it was the evident intention of the court to approve the doctrine of the last cited case, for Mr. Justice Strong in *Case v. Beauregard*, 101 U. S., 688, 693, cites it with approval, saying:

"It may be said that whenever a creditor has a trust in his favor, *or a lien upon property for the debt due him*, he may go into equity without exhausting legal processes or remedies. (*Tappan v. Evans*, 11 N. H. 311; *Holt v. Bancroft*, 30 Ala. 193.) Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien; and, when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution, *but when the bill asserts a lien* or a trust, *and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference*."

3. *It cannot be claimed that there was no attachment lien.*

(*a*) As to whether the property in questson was actually subject to levy has already been discussed (Orig. Brief, pp. 60-64), and the state statutes bearing on the subject set forth. (Appendix to Orig. Brief, pp. 78-80.) By mistake Sec. 743 Rev. Stat. Mo., 1879, was set out instead of 753, reading as follows:

"The process upon a judgment against any corporation shall be *fieri facias*, which the sheriff or other officer shall levy on the moneys, goods and chattels, lands and tenements of such corporation, and proceed thereon as in civil cases."

We therefore say that the property was subject to attachment.

(*b*) But whether it was actually subject to attachment is not a proper matter for re-litigation in this action. The question is *res adjudicata*. In the law action that was an issue. Any error in that regard was subject to review by writ of error but the right to collaterally attack for errors does not exist. Both companies were parties to the law action. The Railway Company, pursuant to state statute so authorizing (Sec. 449 set out in Appendix to Orig. Brief, p 77), filed an interplea asserting that the property was not subject to attachment (Rec. 130) in this language:

"That the property attached in this case and which was levied on by the sheriffs of the different counties as the property of the defendant in this cause is not susceptible of being seized under an execution or attachment, and therefore the pretended levies of said writs of attachment are null and void."

After the judgment of October 20, 1885, (Rec. 133) which sustained the attachment and on October 22, 1885, *both* companies filed motions for new trial, for the record in the law action (Rec. 133) recites:

"This day comes the defendant herein and the interpleader, The Kansas City & Southern Railroad Company, by their attorney, John O'Grady, Esq., and file motions to set aside the verdict and judgment and for a new trial in this case, and affidavits in support of said motions."

On February 1, 1886, the new judgment was entered (Rec. 134), among other things reciting:

"The court doth adjudge and consider that said plaintiffs recover of said defendant thirty-five thousand nine hundred and one and 39–100 dollars ($35,901.39) together with his costs and charges in this behalf expended, and that they have thereof execution, *and that the judgment and execution thereon hold not only to the property attached heretofore in this case, but the other property of the defendant*; but execution shall not issue without special leave of court until after final decree in Chancery Case No. 401, in the case of *Barthold Schlesinger et al. v. The Kansas City & Southern Railway Company et al.*"

That this judgment was not open to collateral attack is clearly the result of *Voorhees v. Bank*, 10 Pet. 449; *Cooper v. Reynolds*, 10 Wal. 308; *Nat'l Bank v. Peters*, (Kansas) 32 Pac. Rep. 637; *Buchanan v. Briggs*, 2 Yates, 233, 234. In 1 Herman on Estoppel & Res Adjudicata, p. 371, it is said:

"When the court has jurisdiction its proceedings are *in rem* after publication which constructively notified the defendant of the proceedings against the property. The court adjudicates upon the property—the thing itself—and orders it sold or delivered to the plaintiff in payment of his debts. The judgment changes the status of the property or debt. It deprives the attaching defendant of all title to it and is binding and conclusive upon all parties to the proceedings."

Certain it is that the parties were present, and the court had the undoubtəd power to decide whether the property which it had seized was attachable. In *Mattingly v. Nye*, 8 Wal. 370, it was decided that the judgment at law was on a creditor's bill conclusive as to the amount due the creditor, and no difference in principle exists where, as here, the validity of the levy was established in the same manner.

Respectfully submitted.

WALLACE PRATT,
JEFFERSON BRUMBACK,
FRANK HAGERMAN,
For Appellants.